NO. 49044-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

SERGEY V GENSITSKIY, Petitioner

CLARK COUNTY SUPERIOR COURT CAUSE NO. 11-1-01186-1

RESPONSE TO PERSONAL RESTRAINT PETITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

IDENTITY OF RESPONDENT AND AUTHORITY FOR RESTRAINT

The State of Washington is the respondent in this matter. The petitioner is restrained by the authority of the Judgment and Sentence under cause number 11-1-01186-1, entered by the Clark County Superior Court on July 6, 2015. See State's Appendix A.

STATEMENT OF THE CASE

A. FACTUAL SUMMARY

Sergey Gensitskiy is an abusive father of ten who dominated and controlled his family through fear. RP 198, 200-20, 234, 238, 220, 319, 369, 378, 393, 420, 423-24, 753. Gensitskiy disciplined his children by beating them with things such as broomsticks, coat hangers, shoes, belts and his hands. RP 213, 420. He made reference to D.S.G (female) about having guns and knowing how to use them in an effort to keep her in line. RP 423. He behaved sexually inappropriately with most of his ten children, and molested or committed incest with at least two of them. RP 214-17, 285, 324, 439-447, 452, 456, 508, 510, 741-51. Gensitskiy would leave pornography visible on his computer. RP 273. Gensitskiy and his wife, Yelena, made it clear to both D.S.G. (female) and C.S.G.[1] (female) that they had no right to their bodies, that their bodies belonged to their

[1] C.S.G. is the victim in the only convictions that remain in this case.

parents. RP 424, 740. With regard to C.S.G, who was seventeen at the time of trial, Gensitskiy fondled her breasts, genitals and buttocks both over and under her clothing. RP 285, 741. He kissed C.S.G. and forced his tongue in her mouth. RP 285, 748. He inspected her to see how she was developing by forcing her to raise her shirt and bra. RP 742-43. C.S.G was required to leave the door unlocked when she showered so her father could come in and look at her and touch her while she was in the shower. RP 743-44. D.S.G. (female) also recounted being embarrassed by her father looking at her in the shower. RP 510. Sometimes while Gensitskiy would be driving in the car with C.S.G. he would put his hand down her pants and touch her vagina under her clothes. RP 744. She believed this started when she was 11 or 12. RP 745.

C.S.G. described a couple of incidents of touching that occurred when she was very young, perhaps around or under the age of seven, when her father would remove her pajamas and rub the insides of her upper thighs. RP 742. The rubbing was under her clothing. *Id.* These were the incidents that gave rise to count 2. CP 13.

When C.S.G. was 15 she left the home and was placed with Randy and Tami Patterson, who were family friends to the children. RP 752. D.S.G. also lived with the Patterson's at one point. RP 597-98.

Dorothy Buchner was a family friend of the Gensitskiys. RP 367. Yelena Gensitskiy worked as her housekeeper. *Id.* In the summertime, she would have the Gensitskiy children over to her house to swim. *Id.* On one occasion when the children were swimming in her pool, the defendant came over and Mrs. Buchner watched as all of the children fell silent after previously playing and having fun. RP 368-69. Mrs. Buchner and her husband took the Gensitskiy family to Disneyland on a vacation at one point. RP 369. Initially it was to be a trip for the children, but Yelena insisted the Buchner's bring the defendant along as well. *Id.* On the first day they were in Disneyland, Mrs. Buchner saw the defendant kiss his oldest daughter, Svetlana, on the lips. *Id.* Svetlana became stiff and didn't smile, keeping her arms straight at her side. *Id.* At that time, Mrs. Buchner was confused and was inclined to "chalk it up to cultural behavior, just a different culture, different rules, different attitudes, and so I let that go." *Id.* A few years later as the girls were growing up they would continue to come to the pool. RP 370. At one point the defendant was in the pool with them and asked D.S.G. to come over to him. *Id.* D.S.G. was wearing a two piece suit and the defendant was "holding her up and the expression on her face and the way she looked led me to just call her into the kitchen to help me and get her out of that situation." *Id.* D.S.G. was a teenager at the time. *Id.*

D.G. is the second oldest boy of the ten Gensitskiy children. RP 198. When asked to describe family life in the Gensitskiy home, he said "there's a lot of hidden chaos and torment." RP 200. He and his siblings had little freedom and were restricted to the home and very secluded. *Id.* In addition to the physical discipline described above, Gensitskiy thought it amusing to pull down his children's pants and pinch their buttocks, and would continue doing so even if asked to stop. RP 216. D.G. observed that going into his sisters' teenage years, as they went through puberty, Gensitskiy would undress the girls before bed, to include taking off their bras. RP 216. He would also have the girls sit on his lap in front of the computer and pull back their shirts and bras and look at them. RP 216-17.

Gensitskiy was convicted of various acts of child molestation against C.S.G. On direct appeal, the convictions involving C.S.G. were upheld. As to one of the counts involving D.S.G., Count 7, Gensitskiy won reversal when Division erroneously ruled that a child being over the age of twelve is an essential element of child molestation in the second degree. This is entirely incorrect, but Gensitskiy reaped the benefit of this ruling nevertheless. See *State v. Goss*, 186 Wn.2d 372, 378 P.3d 154 (2016). Gensitskiy was acquitted of two counts. CP 78,100.

B. DEFENDANT'S DECLARATIONS

1. Charles Buckley.

Charles Buckley, Mr. Gensitskiy's retained trial counsel, has executed an affidavit pertaining solely to the jury book issue raised by Gensitskiy. His declaration says nothing about his tactical decisions not to seek severance of any of the counts charged or about his decision not to object to the testimony of Erin Haley. With respect to the jury book issue, Buckley claims:

> I have no idea how the prosecutor obtained this Order in an ex parte manner. I was never provided any notice that the prosecutor intended to obtain an Order so that she could review the 'juror book' and 'jury list' prior to the State's trial in Sergey's case. Given these circumstances, the defense was never given an opportunity to set forth an opposition to the State's motion as set forth in the Order—or to participate in any court proceedings in regard to the State's motion to review the juror book and jury list.
>
> ...
>
> If I had known the prosecutor intended to obtain the juror list and jury book on July 25, 2012, I would have insisted that these same benefits be given to the defense.

Buckley Declaration at 2-3.

What Buckley fails to mention in his affidavit is that he *was* given an equal opportunity to view and obtain a copy of the jury book by operation of Clark County Local Superior Court Rule 47.

The State does not agree to the truth of any factual assertion made by Charles Buckley. In *In re Personal Restraint of Gasteazoro-Paniagua*, No. 47042-0-II, another personal restraint petition involving another of

Buckley's clients, Buckley made a materially false representation to this Court. Specifically, Buckley claimed that he was not provided with certain criminal history of one of the State's witnesses. However, email correspondence between Buckley and the Senior Deputy Prosecutor who handled that case showed that Buckley received notice of the convictions. See State's Appendix D (State's brief in *In re Personal Restraint of Gasteazoro-Paniagua* at 11-6, and appendices attached to brief). The prosecutor, additionally, outlined the witness's criminal history in his motion in limine. *Id.* Even worse, the verbatim report of proceedings revealed Buckley and the deputy prosecutor arguing about the admissibility of convictions that he later claimed, *under oath*, had never been disclosed to him. *Id.* At a loss for another description, the State is constrained to say that Buckley made a knowingly false statement to this Court in his declaration in that case. The State, therefore, does not concede the truth of any statement made by Buckley in any declaration made to this or any other court that has not been tested by the crucible of cross-examination and found credible by a neutral fact-finder.

The insinuation of Buckley's declaration, executed in April of 2016, is that he was blindsided to learn that a party, on its own, could seek a jury book. He insinuates that this process would customarily involve legal argument and potential objection (despite the fact that obtaining the

jury book is flatly provided for by Local Rule 47). But in 2014, in a hearing in *State v. Pedro Godinez*, Cause No. 12-1-02162-7, Buckley stood mute while the prosecutor, in his presence and on the record, handed forward an order for the jury book. See State's Appendix E. The State identified the order out loud as a jury book order, and handed forward an order that is identical to the order at issue in this case. State's Appendix E. If Buckley would have this Court believe he would have objected in this case to the State reviewing the jury book without him getting the same benefit, why didn't he object in the Pedro Godinez case[2]? Why didn't he ask to look at the order that was handed forward in his presence, and ask to have his own? Why didn't he ask the State to interpose his name on the order so he could get one too? Buckley's declaration is simply not credible. Buckley is very aware he can get a jury book, but he elected not to both in this case and in the Pedro Godinez case.[3] Electing not to spend precious time reviewing a jury book prior to trial is a reasonable decision an attorney is permitted to make according to his own judgment about how best to spend his time.

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[2] Pedro Godinez was charged with attempted murder in the first degree and robbery in the first degree.

[3] The State has reviewed the documents on file in the Liberty electronic superior court database for the Pedro Godinez case and it reveals no order submitted by Charles Buckley for obtaining the jury book.

2. Todd Maybrown.

Mr. Maybrown represents Gensitskiy in this personal restraint petition. He claims that he has never before seen an order like the order allowing jury book review in this case. This would be a more interesting statement if Mr. Maybrown regularly tried cases in Clark County. But his declaration is silent on how many criminal cases he has tried to jury in Clark County, if any. He also fails to mention whether he's aware of Clark County Local Superior Court Rule 47, the rule that allows both sides equal access to the jury book. Maybrown's declaration is largely argument that should have been put in his brief. Paragraph 17 at sentence one, and paragraphs 25, 26, 27, 28, and 30 contain legal arguments that have no place in a purported declaration of facts. Those portions of the Maybrown declaration must be stricken.

3. Barbara Corey.

Barbara Corey's declaration contains no facts that aren't apparent from the record, to wit: That Judge Stahnke signed an order allowing the State to view the jury book pursuant to Clark County Local Superior Court Rule 47. The declaration purports to offer an expert legal opinion on the definition of ex parte contact, which invades the decision-making province of this Court and is improper and not admissible, as will be shown in the argument section below. The declaration further purports to offer an

expert legal opinion that Gensitskiy suffered prejudice from the operation of Clark County Local Superior Court Rule 47, which allows each party to review the jury book prior to trial. This, also, invades the province of this Court. Moreover, Ms. Corey did not read the verbatim report of proceedings in this matter, with the exception of a single hearing which occurred on July 25, 2012. As such, she lacks the foundation to opine on whether Gensitskiy suffered actual and substantial prejudice in this case, which necessarily involves an analysis of the facts presented to the jury. This declaration should be stricken by this Court.

4. Brad Meryhew.

Meryhew's declaration, like Corey's, purports to contain expert legal opinion that is improper and inadmissible. It also contains legal argument that, apparently, is offered in lieu of legal argument in the brief. For petitioner's counsel to fail to include legal argument in his brief to support his claims, preferring instead to circumvent the fifty-page limit for briefs and place the legal argument in a "declaration" is wholly improper. It renders the petitioner's brief deficient. Further, the declaration should be stricken by this Court.

5. Sergey Gensitskiy.

Gensitskiy's declaration pertains entirely to the juror questionnaire issue and fails to address the severance claim. As to the juror

questionnaire claim, the State disputes his unsubstantiated remark that the State received "special permission" to review the jury book, and that such permission was only available to one side. As noted throughout this response, Clark County Local Superior Court Rule 47 allows both parties to view the jury book prior to trial. The State also disputes his claim that the State had a "private meeting" or a "secret meeting" with the judge. As noted in the declaration of Anna Klein, attached to this response, Ms. Klein never met with the judge.

6. Lenell Nussbaum.

Ms. Nussbaum represented Gensitskiy on appeal. In her declaration, she declares that she did not raise the jury book issue now being raised in this PRP because she did not believe it was a meritorious claim based on the existing record. As to the severance claim, Nussbaum offers no explanation why that issue was not raised on direct appeal. As to the testimony of Erin Haley, she states that she "failed to identify any issue regarding Ms. Haley's testimony." Yet she reviewed Ms. Haley's testimony.

C. STATE'S DECLARATIONS (ATTACHED AS "APPENDIX B")

1. Anna Klein.

Ms. Klein was the deputy prosecutor assigned to try this case. She declares that Clark County Superior Court Local Rule 47 allows attorneys

to review juror questionnaires in advance of trial. It is her experience that it is common practice for attorneys to seek an order ex parte from the court allowing them to review the jury book. In 2012, when this case was tried, it was Ms. Klein's personal practice to send an order for a jury book with the office's court runner for signature by a judge. It has never been her practice to personally bring these orders over to a judge for signature and in this case, she did not personally meet with the judge to present this order for signature. When sending these orders for signature, she would not present any type of legal argument about the order (presumably because such orders are governed by local court rule).

2. Gayle Hutton.

Gayle Hutton has been a legal assistant with the Prosecutor's Office fifteen years. Prior to that, she worked as a legal assistant for various criminal defense attorneys in Clark County. As part of her duties she is routinely asked to prepare orders to obtain jury books on cases that are set to proceed to trial in Superior Court. During her time as a legal assistant on the criminal defense side, she also occasionally requested jury books on behalf of those attorneys as well. The process for obtaining a jury book involves sending an order with a court runner to a judge for signature. Once the order is signed, it is filed with the Clerk's office and a copy is provided to the jury coordinator for the County. The coordinator's

office will notify a party when the book is ready and the runner then picks it up.

3. James Smith.

James Smith is a deputy prosecuting attorney for Clark County. He declares that Clark County Superior Court Local Rule 47 requires a court order for an attorney to review juror questionnaires outside the courtroom or office of the Superior Court Administrator. Mr. Smith declares "In my experience, an attorney, either for the defendant or the prosecution, will present an order to the court allowing outside review of the questionnaires. This order is often presented at the readiness hearing the week before trial, but it is also sometimes presented ex parte." Mr. Smith further declares that in his experience, criminal defense attorneys in Clark County are aware of the process to view jury questionnaires. He declares that he "personally had multiple criminal defense attorneys request permission to remove the jury questionnaires either via pretrial motions in limine, at the readiness hearing, or otherwise. These requests have always been granted by the court."

The State has attached, at State's Appendix C, a motion in limine from a readiness hearing from *State v. Shawn Crawford*, as assigned to deputy prosecutor James Smith. In that motion, defense attorney Matthew Hoff made a motion to be provided "copies of jury questionnaires in

advance of trial." This motion demonstrates that the ability to obtain a jury book pursuant to Local Rule 47 is not "secret," nor available only to the State.

ARGUMENT

A personal restraint petition is not a substitute for a direct appeal. *In re Pers. Restraint of Hagler*, 97 Wn.2d 818, 823-24, 650 P.2d 1103 (1982). A personal restraint petitioner must prove either a constitutional error that caused actual prejudice or a nonconstitutional error that caused a complete miscarriage of justice. *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). The petitioner must state the facts on which he bases his claim of unlawful restraint and describe the evidence available to support the allegations; conclusory allegations alone are insufficient. RAP 16.7(a)(2)(i); *In re Pers. Restraint of Williams*, 111 Wn.2d 353, 365, 759 P.2d 436 (1988); *In re Pers. Restraint of Stockwell*, 161 Wn.App. 329, 254 P.3d 899 (2011).

In evaluating personal restraint petitions, the Court can: (1) dismiss the petition if the petitioner fails to make a prima facie showing of constitutional or nonconstitutional error; (2) remand for a full hearing if the petitioner makes a prima facie showing but the merits of the contentions cannot be determined solely from the record; or (3) grant the personal restraint petition without further hearing if the petitioner has

proven actual prejudice or a miscarriage of justice. *Cook*, 114 Wn.2d at 810-11; *In re Pers. Restraint of Hews*, 99 Wn.2d 80, 88, 660 P.2d 263 (1983).

I. The trial court did not engage in unlawful ex parte contact, deny Gensitskiy the right to be present at a critical stage of the proceedings, or conduct a closed hearing, and appellate counsel was not ineffective.

Gensitskiy claims that the routine practice wherein Deputy Prosecutor Anna Klein obtained a copy of the jury book prior to trial, just as Mr. Buckley could have done according to Local Rule 47, engaged in a "secret meeting" with Judge Daniel Stahnke. This claim is meritless.

Under Clark County Local Superior Court rule 47 (2), a party may obtain a jury book for review prior to trial. The rule states:

> Juror questionnaires may not be removed from or viewed outside the office of the Superior Court Administrator or the courtrooms of the Superior or District Courts without the express approval of the trial judge.

As the declarations of Anna Klein, James Smith, and Gayle Hutton (State's Appendix B), as well as the motion in limine in the Shawn Crawford case (State's Appendix C) make clear, the practice of a party obtaining the jury book for review prior to trial is routine and available to both sides equally. Appendices B and C. There was no improper ex parte contact. And as the declaration of Anna Klein explains, there was no "secret meeting" between her and Judge Stahnke. Indeed, there was no

meeting at all. See State's Appendix B. To the extent that Charles Buckley claims, in his declaration, that this is a secret process available only to one party (the State), he makes a material misrepresentation to the Court. And as noted above in the Statement of the Case, the State would not agree that any factual statement made by Charles Buckley is true absent an opportunity to cross examine him and have a neutral trier of fact make a credibility determination. Mr. Buckley made a very serious materially false statement in his declaration in matter of the *Personal Restraint of Gasteazoro-Paniagua*, 2016 WL 6756224, No. 47042-0-II (Nov. 15, 2016) (State's Appendix D). The claims made by Gensitskiy that the process for obtaining a jury book prior to trial is only available to the State, and that the book was obtained as a result of a "secret meeting" between Anna Klein and Judge Stahnke, are disproven by the State's evidence attached to this response.

Gensitskiy's claim that Judge Stahnke signing a jury book release pursuant to Rule 47 constituted an unlawful ex parte contact lacks merit. Again, each side is equally able to engage in the ministerial act of having the Superior Court Administration Office give him or her a copy of the jury book. There is no legal argument to be made pursuant to a request under Rule 47. There is no objection to be lodged. Getting a jury book is plainly provided for in the rules to any party to a case proceeding to trial.

Had Gensitskiy lodged an objection to the request it would not have been sustained.

Gensitskiy bases his claim that the retrieval of the jury book was an ex parte contact on the "expert" legal opinions of Barbara Corey and Brad Meryhew, as well as the factually inapposite *State v. Watson,* 155 Wn.2d 574, 122 P.3d 903 (2005). But a petitioner may not rely on "expert" legal opinions to establish error. The role of lawyers on the question of ineffectiveness or other legal principles is as advocates, not as experts. Anything a legal "expert" would say in a declaration or from the witness stand is no different from what the defendant's lawyer can simply argue from the bar or, more properly, argue in the brief. I, Anne Cruser, am an attorney with nearly nineteen years of experience in criminal law, including eight years as a trial and appellate defense attorney and nearly eleven years as a trial and appellate prosecutor. I am an "expert" in these matters as well. In my expert opinion, this was not an unlawful ex parte contact. Does that settle the question? No, it doesn't, because the legal questions at hand are to be settled *by this Court.*

Neither a trial court nor an appellate court is permitted to consider conclusions of law contained in affidavits. *Parkin v. Colocousis*, 53 Wn.App. 649, 653, 769 P.2d 326 (1989). "Experts may not offer opinions of law in the guise of expert testimony." *Stenger v. State*, 104 Wn.App.

393, 407, 16 P.3d 655 (2001); citing ER 704 cmt.; *King County Fire Prot. Dists. No. 16, 36, 40 v. Housing Auth.*, 123 Wn.2d 819, 826 n. 14, 872 P.2d 516 (1994); *Orion Corp. v. State,* 103 Wn.2d 441, 462, 693 P.2d 1369 (1985). "Legal opinions on the ultimate *legal* issue before the court are not properly considered under the guise of expert testimony." *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 344, 858 P.2d 1054, 1078 (1993) (emphasis in original).

As noted in the Statement of the Case, above, the declarations of Meryhew, Corey, and Maybrown must be stricken by this Court because they purport to offer expert legal opinions on ultimate issues to be decided by this Court. Any portion of Gensitskiy's brief which cites to these declarations as authority is invalid and should not be considered by this Court. Gensitskiy states "there is no doubt that the prosecutor engaged in an *ex parte* communication with Judge Stahnke relating to the Gensitskiy matter," and cites to the declaration of Corey. (Brief of Pet. At 26). This should be stricken.

The jury book request in this case is no different from a defense attorney submitting an order to be paid on an appointed criminal case at the conclusion of the case or an order requesting funds for an investigator or witness travel expenses. These orders are routinely submitted to the court ex parte. They are ministerial. This order was ministerial as well.

Beyond the inadmissible declaration of Barbara Corey, Gensitskiy relies on *State v. Watson* to establish that the Rule 47 jury book request in this case was an unlawful ex parte contact. *Watson,* relying on a string of five cases, held that the definition of ex parte contact is a communication between counsel and the court when opposing counsel is not present, done or made at the instance and for the *benefit of one party only*, and without notice to, or argument by, any person *adversely* interested. *State v. Watson,* 155 Wn.2d 574, 579, 122 P.3d 903 (2005). This definition immediately shows why the jury book order in this case was not an improper ex parte communication: It was not done for the benefit of only one party, and Gensitskiy was not adversely interested in this action because he was free to access the jury book himself and any objection he might have lodged to *either party* obtaining the jury book would have failed under Local Rule 47. The cases on which *Watson* relies involve actions that engender benefit to one party to exclusion of the other:

> Moreover, courts generally apply the term ex parte communication to communications made by or to a judge, during a proceeding, regarding that proceeding, without notice to a party. *See, e.g., State v. Bourgeois,* 133 Wn.2d 389, 407–08, 945 P.2d 1120 (1997) (finding an improper ex parte communication between the bailiff (the alter-ego of the judge) and the jury where a juror told the bailiff of juror intimidation which the bailiff relayed to the judge, but which the judge did not pass on to counsel); *Sherman v. State,* 128 Wn.2d 164, 181, 205, 905 P.2d 355 (1995) (finding an ex parte communication where a judge's judicial extern contacted the Washington monitored treatment program to find out about the

> monitoring of physicians in the program, specifically the plaintiff in a case before the judge involving an employment dispute over the plaintiff's drug use); *Buckley v. Snapper Power Equip. Co.,* 61 Wn.App. 932, 937–38, 813 P.2d 125 (1991) (holding that a direct communication between a trial judge and a guardian ad litem regarding settlement, which was passed on to defense counsel without the knowledge or participation of the plaintiff's counsel, was an improper ex parte communication); *State v. Romano,* 34 Wn.App. 567, 568–69, 662 P.2d 406 (1983) (concluding there was an ex parte communication where a judge, during a current proceeding, contacted third parties to verify the defendant's income without the defendant's knowledge); *United States v. Forbes,* 150 F.Supp.2d 672, 677 (D.N.J.2001) (reasoning the "term [ex parte] contemplates that one actually be a party to a matter before the communication of another party is considered '*ex parte.*' ").

Watson at 579–80.

What Gensitskiy's case lacks in common with the cases cited above is that the process of getting a jury book is not secret, it is routinely done, and equally available to both parties. To the extent Charles Buckley's declaration suggests otherwise it is not credible. Gensitskiy fails to show that the request for an order to view the jury book in this case pursuant to Clark County Superior Court Local Rule 47 was an unlawful ex parte contact.

Gensitskiy further claims in signing the order allowing the State to view the jury book pursuant to Local Rule 47, Judge Stahnke violated the canons of judicial conduct, violated Gensitskiy's right to be present at a critical stage of the proceedings, and conducted a closed courtroom proceeding. These claims are meritless.

Gensitskiy cites case law which holds, unsurprisingly, that a judge should apply the law and do his or her job fairly and impartially. But Judge Stahnke did apply the law—Local Rule 47. And Because Gensitskiy had equal access to the jury book, Judge Stahnke did not act partially or unfairly. Judge Stahnke exhibited no bias. In his brief, Gensitskiy assumes that outrage and hyperbole are substitutes for argument. Judge Stahnke complied with the applicable local court rule and did not demonstrate bias. It is a matter of personal preference for attorneys on whether to spend precious time reviewing a jury book prior to trial. Some might think that is time well spent, while some might think such an endeavor diverts valuable time from other case preparation. Some might think that the time spent waiting for things to get going on the morning of trial is the best time to look over juror questionnaires, while some might think that the voir dire questioning time alone is enough to pick a suitable jury. Judge Stahnke would have no reason to assume, first, that Mr. Buckley failed to learn the local superior court rules before conducting trials in superior court (which the State does not concede is true because the State does not believe Mr. Buckley is credible), or, second, that Mr. Buckley would have liked to see the jury book prior to trial. Judge Stahnke did not violate the canons of judicial conduct or Gensitskiy's right to due process.

Regarding Gensitskiy's claim that Judge Stahnke conducted a closed courtroom proceeding and violated his right to be present at a critical stage of the proceedings, Gensitskiy fails to show this is true. The signing of an order to allow a party to view the jury book is not a critical stage of the proceedings, nor is it an action to which the public trial right attaches. Gensitskiy again substitutes conclusory statements for argument when he states "Without question, the right would apply to the presentation of the prosecution's motion for special access to the jury list that was presented in this case." Brief at 34. He then goes on to say "Moreover, applying the 'experience and logic' test, this type of motion that [sic] must be presented in open court." *Id.* But a careful review of his brief reveals that he neither analyzes the signing of this order under the experience and logic test, nor does he apply case law to show that this is a critical stage of the proceeding. He just assumes the reader will agree, or will come to that that conclusion on her own.

Under the test for critical stage of the proceeding, "a defendant has a right to be present 'whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.'" *State v. Irby*, 170 Wn.2d 874, 881, 246 P.2d 796 (2011), quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105–06, 54 S.Ct. 330, 78 L.Ed. 674 (1934), *overruled in part on other grounds sub nom. Malloy v. Hogan*, 378

U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964). In *In re Personal Restraint of Lord*, 123 Wn.2d 296, 306, 868 P.2d 835 (1994), the Supreme Court held the defendant had no right to be present during in-chambers or bench conferences between the court and counsel on legal matters. In *In re Personal Restraint of Pirtle*, 136 Wn.2d 467, 484, 965 P.2d 593 (1998), the Supreme Court held the defendant had no right to be present at an in-chambers conference between the court and counsel which involved legal matters such as the wording of jury instructions, and ministerial matters such as jury sequestration. In *Matter of Personal Restraint of Benn*, 134 Wn.2d 868, 920, 952 P.2d 116 (1998), the Supreme Court held the defendant did not have a right to be present during a hearing on a motion for a continuance. "His absence during that hearing did not affect his opportunity to defend the charge. The motion for continuance involved no presentation of evidence, nor was the purpose of the hearing on the motion to determine the admissibility of evidence or the availability of a defense or theory of the case." *Benn*, 134 Wn.2d at 920. Under the test set forth by the United States Supreme Court and the Washington Supreme Court, Gensitskiy was not denied his right to be present at a critical stage of the proceedings when the trial court signed an order pursuant to Local Rule 47 allowing a party to view the jury book prior to trial. Because there was no

error, Gensitskiy's claims of due process violation and ineffective assistance of appellate counsel fail.

Gensitskiy also did not suffer a court closure as a result of this order. Gensitskiy's argument on this point is close to non-existent. He cites case law which stands for the unremarkable proposition that the public trial right is implicated in voir dire. But he fails to show that a party reviewing a jury book prior to trial is part of voir dire. He just assumes it to be so. In order to determine whether the public trial right attaches to a particular proceeding, the reviewing court must apply the experience and logic test. *State v. Sublett*, 176 Wn.2d 58, 73-74, 292 P.3d 715 (2012). "[R]esolution of whether the public trial right attaches to a particular proceeding cannot be resolved based on the label given to the proceeding." *Sublett* at 73, citing *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8-10,106 S.Ct. 2735, 92 L.Ed.2d 1 (1986) (*Press II*). Because Gensitskiy cites no case that addresses the question of whether the public trial right attaches to the viewing of juror questionnaires by the parties[4] prior to trial pursuant to local court rule, we must assume there is none. *State v. Young,* 89 Wn.2d 613, 625, 574 P.2d 1171 (1978). As such, Gensitskiy is required to analyze his claim under the experience and logic test and prove to this

[4] It is important to note that in the public trial right context, it would not matter whether it was the State, the defendant, or both who viewed the jury book prior to trial. The viewing of the jury book is either part of the trial or it is not.

Court that the public trial right attaches to the obtaining and reviewing of a jury book prior to trial. He bears that burden as the petitioner. He has wholly failed to meet this burden, and thus fails to show error. His entire treatment of the experience and logic test, made without citation to authority, is found on page 34 of his brief: "Moreover, applying the 'experience and logic' test, this type of motion that [sic] must be presented in open court." This is insufficient to meet his burden of showing error, much less prejudicial error. "We need not consider arguments that are not developed in the briefs and for which a party has not cited authority." *State v. Harris*, 164 Wn.App. 377, 389 n.7, 263 P.3d 1276 (2011). Because Gensitskiy fails to show a violation of his public trial right, his claim of ineffective assistance of appellate counsel fails.

Gensitskiy fails to demonstrate error with respect to the State reviewing the jury book prior to trial, which he easily could have done himself as well. Moreover, he fails to demonstrate not just the possibility of prejudice, but actual and substantial prejudice infecting his entire trial with error of constitutional dimensions. *In re Stockwell,* supra, at 597.

II. Gensitskiy was not denied effective assistance of trial or appellate counsel when trial counsel elected not to object to certain testimony, and appellate counsel did not raise the lack of objection on appeal.

Gensitskiy claims his trial attorney was ineffective for failing to

object to witness Erin Haley's testimony, specifically, for failing to object to her testimony that the victim, C.S.G., suffered from post-traumatic stress disorder and sexual abuse. The evidence was properly admitted, and even if this Court finds it was erroneously admitted, its admission was harmless and thus Gensitskiy's claim of ineffective assistance of counsel fails.

In terms of Gensitskiy's personal restraint petition and his claim of ineffective assistance of counsel, this Court must determine whether counsel was ineffective for failing to object to the admission of the complained-of evidence. Counsel is not ineffective if he had a reasonable trial strategy for failing to object or if the failure to object did not prejudice his client. If the error is harmless, then Gensitskiy suffered no prejudice and his claim of ineffective assistance of counsel fails. Thus, below, the State addresses whether counsel had a legitimate trial strategy or tactic for failing to object, whether the evidence was properly admissible, and whether such admission, if error, was harmless.

Gensitskiy claims Ms. Haley improperly testified to her opinion on his guilt. *See.* Br. of Petitioner, p. 38. Specifically, Gensitskiy cites to the following testimony as erroneous:

- Ms. Haley stating "yes" when asked if she had "f[ou]nd out from [C.S.G.] what exactly it was that had happened to her sexually." RP 284.

- Ms. Haley testifying to C.S.G.'s "problems":

  "[C.S.G] came in with quite a few difficulties. Initially it was related to anxiety and fear. After she had disclosed the abuse, she had been experiencing some suicidal thoughts and had some plans about killing herself that we needed to work on. She was depressed and crying a lot. She was having difficulty concentrating, paying attention, getting her schoolwork completed. She had fears that her father may try to hurt her or someone in her family may retaliate against her for the disclosures that she had made about the abuse. She was quite fearful and anxious." RP 286-87.

- Ms. Haley testifying to C.S.G.'s diagnoses:

  "Well, I've offered a few diagnoses. Originally when I first met with her on November 3, 2010, I offered a diagnosis of sexual abuse of a child, which indicates she was a victim of sexual abuse. And that is how we treat children who come in through our specific sexual abuse grant." RP 287.
  "The diagnosis offered for [C.S.G.] later in her treatment was posttraumatic stress disorder and also major depressive disorder." RP 287-88.

  "So posttraumatic stress disorder is a mental health condition that can come on after someone experiences a traumatic event. And it includes responses such as helplessness, extreme fear, anger, and those reactions are quite common to a traumatic event, though the symptoms in posttraumatic stress disorder last at least one month after the trauma and tend to either worsen or get to a level where they're interfering significantly in someone's life functioning. So that's posttraumatic stress disorder." RP 288.

  "When looking to make a diagnosis of posttraumatic stress disorder, we look at a few qualities. So one would be whether or not the client is experiencing what we call persistent re-experiencing of the trauma. So that can include flashbacks or nightmares, for example, which she was. And we also look at either avoidance in response to some trauma stimuli. So trying to avoid conversations or people or places that remind her of the trauma. Also looking at her general responsiveness. So looking at

> is her emotional range typical or is she quite limited or stunted in her emotional range. Does she view herself having a successful future or not. Those are some areas where we look at for what they call numbing of responsiveness. And then we also look at criteria related to an arousal state. So there may be symptoms of anger outbursts or sleep disturbance or hypervigilance where someone's really on edge. And those are the three criteria areas where we look at for whether or not someone has experienced posttraumatic stress disorder after a traumatic event." RP 289-90.
>
> "For [C.S.G.] I was seeing nightmares, flashbacks, anger outbursts. She was avoidant of wanting to talk about the trauma, avoidant of people who reminded her of the trauma, having intense emotional and physical reactions when posed to situations where she might have to see or talk to somebody who was related to the trauma. Also, poor concentration. Her sleep was pretty disturbed, she was having nightmares, like I mentioned, and just difficulty falling and staying asleep as well." RP 290.

The Sixth Amendment to the United States Constitution and article I, § 22 of the Washington Constitution guarantee the right of a criminal defendant to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). In *Strickland*, the United States Supreme Court set forth the prevailing standard under the Sixth Amendment for reversal of criminal convictions based on ineffective assistance of counsel. *Id.* Under *Strickland*, ineffective assistance is a two-pronged inquiry:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the

> defendant by the Sixth Amendment Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable.

Thomas, 109 Wn.2d at 225-26 (quoting *Strickland*, 466 U.S. at 687); *see also State v. Cienfuegos*, 144 Wn.2d 222, 226, 25 P.3d 1011 (2011) (stating Washington had adopted the *Strickland* test to determine whether counsel was ineffective).

Under this standard, trial counsel's performance is deficient if it falls "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation. To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome "a strong presumption that counsel's performance was reasonable." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Accordingly, the defendant bears the burden of establishing deficient performance. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A defense attorney's performance is not deficient if his conduct can be characterized as legitimate trial strategy or tactics. *Kyllo*, 166 Wn.2d at 863; *State v.*

Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) (holding that it is not ineffective assistance of counsel if the actions complained of go to the theory of the case or trial tactics) (citing *State v. Renfro*, 96 Wn.2d 902, 909, 639 P.2d 737 (1982)).

A defendant can rebut the presumption of reasonable performance of defense counsel by demonstrating that "there is no conceivable legitimate tactic explaining counsel's performance." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999). Not all strategies or tactics on the part of defense counsel are immune from attack. "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

To satisfy the second prong of the *Strickland* test, the prejudice prong, the defendant must establish, within reasonable probability, that "but for counsel's deficient performance, the outcome of the proceedings would have been different." *Kyllo*, 166 Wn.2d at 862. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 266; *Garrett*, 124 Wn.2d at 519. In determining whether the defendant has been

prejudiced, the reviewing court should presume that the judge or jury acted according to the law. *Strickland*, 466 U.S. at 694-95. The reviewing court should also exclude the possibility that the judge or jury acted arbitrarily, with whimsy, caprice or nullified, or anything of the like. *Id.*

Also, in making a determination on whether defense counsel was ineffective, the reviewing court must attempt to eliminate the "distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from the counsel's perspective at the time." *Id.* at 689. The reviewing courts should be highly deferential to trial counsel's decisions. *State v. Michael*, 160 Wn.App. 522, 526, 247 P.3d 842 (2011). A strategic or tactical decision is not a basis for finding error in counsel's performance *Strickland*, 466 U.S. at 689-91.

The decision of when or whether to object is a classic example of trial tactics." *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662, *review denied*, 113 Wn.2d 1002, 777 P.2d 1050 (1989). Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal. *Madison* at 763; *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). This court presumes that the failure to object was the product of legitimate trial strategy or tactics, and the onus is on the defendant to rebut this

presumption. *In re Personal Restraint of Davis*, 152 Wn.2d, 647, 714, 101 P.3d 1 (2004) (quoting *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002)). Further, "[t]he absence of an objection by defense counsel strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." *State v. Edvalds*, 157 Wn.App. 517, 525-26, 237 P.3d 368 (2010), citing *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990). "Counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or an appeal." *Swan* at 661, quoting *Jones v. Hogan*, 56 Wn.2d 23, 27, 351 P.2d 153 (1960).

Gensitskiy's claim his attorney was ineffective for failing to object to Ms. Haley's testimony is meritless. His attorney's conduct is presumed to be effective, and his decision not to object is presumed to have been because of a legitimate trial strategy or tactic. Notably, there is no declaration from Mr. Buckley addressing why he elected not to object to this testimony when such a declaration was easily attainable by Gensitskiy. The declaration from Mr. Buckley Gensitskiy chose to append to his brief addresses only Mr. Buckley's claims about the jury book.

As an initial matter, Ms. Haley's testimony was not objectionable, and no objection by defense counsel would have been

successful. It is improper for a witness to express a personal opinion regarding the guilt of the accused. *State v. Kirkman,* 159 Wn.2d 918, 937, 155 P.3d 125 (2007). Such impermissible opinion testimony about a defendant's guilt may constitute reversible error because it violates the defendant's constitutional right to a jury trial, which includes an independent determination of the facts by the jury. *Id.* at 935–37. In order to determine whether statements constitute impermissible opinion testimony, this Court would consider the circumstances of the case, including: (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact. *Demery,* 144 Wn.2d at 759. "[T]estimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony." *City of Seattle v. Heatley,* 70 Wn.App. 573, 578, 854 P.2d 658 (1993).

An expert witness may testify "in the form of an opinion or otherwise." ER 702. Whether to admit expert testimony is within the sound discretion of the trial court. *State v. Swan*, 114 Wn.2d 613, 655, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991). Opinion testimony is still admissible even if it "embraces an ultimate issue to be decided by the trier of fact." ER 704. However, "[n]o witness, lay or expert, may testify

to his opinion as to the guilt of a defendant, whether by direct statement or inference." *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). The admission of a witness's opinion on the ultimate question of a defendant's guilt violates the defendant's constitutional right to an impartial trial, including the independent determination of the facts by the jury. *State v. Carlin*, 40 Wn.App. 698, 701-02, 700 P.2d 323 (1985), *overruled on other grounds by City of Seattle v. Heatley*, 70 Wn.App. 573, 854 P.2d 658 (1993), *rev. denied*, 123 Wn.2d 1011 (1994). Whether an opinion by a witness is permissible is entirely dependent on the facts and circumstances of each individual case. *State v. Cruz*, 77 Wn.App. 811, 814-15, 894 P.2d 573 (1995).

Gensitskiy relies primarily on *State v. Florczak*, 76 Wn.App. 55, 882 P.2d 199 (1994), *rev. denied*, 126 Wn.2d 1010 (1995) to support his contention that the testimony from Ms. Haley was improper and therefore his attorney should have objected. In *Florczak*, the Court held that it was constitutional error for a counselor to opine that a child had been sexually abused, an opinion which was based solely on the child's statements, and not on the counselor's experience or any physical evidence. *Florczak*, 76 Wn.App. at 59, 74. The other cases Gensitskiy relies upon also similarly discuss situations in which therapists or doctors offered opinions based solely on a victim's statements and their belief of her credibility, and not

on their own experience, knowledge, or physical evidence. *See State v. Black*, 109 Wn.2d 336, 348-49 (1987) (finding counselor's testimony of her diagnosis of rape trauma syndrome based solely on the victim's statements was improper); *State v. Alexander*, 64 Wn.App. 147, 154, 822 P.2d 1250 (1992) (finding expert's opinion based solely on expert's perception of witness's credibility was improper); *State v. Fitzgerald*, 39 Wn.App. 652, 656-57, 694 P.2d 1117 (1985) (finding medical opinion improper because it was based solely on doctor's evaluation of a child's veracity); *State v. Carlson*, 80 Wn.App. 116, 906 P.2d 999 (1995) (holding the medical opinion based solely on a child's statements was improper). Here, by contrast, Ms. Haley's diagnosis was not based solely on what C.S.G. told her or her opinion of C.S.G.'s credibility, but rather based as well on her education, certifications, training and experience in treating children with trauma experiences. Thus her opinion that C.S.G. suffered from PTSD and sexual abuse was not improperly admitted.

The vast majority of the testimony from Ms. Haley that Gensitskiy now takes issue with is based on her testimony about C.S.G. suffering from PTSD. In the case Gensitskiy relies upon to support his contention, this Court found admission of a therapist's diagnosis of PTSD was not improper. In *Florczak*, the therapist diagnosed the victim with PTSD, relying on a checklist of her behavioral symptoms. *Florczak*, 76 Wn.App.

at 74. There the Court stated, "[t]he post-traumatic stress syndrome diagnosis was not, in itself, testimony about child sexual abuse syndrome or testimony that [the victim] fit a "profile" of a sexually abused child." *Id.* The Court went on to find that as the therapist's testimony did not indicate that certain behaviors demonstrated or substantiated sexual abuse, it "did not usurp the jury's function of weighing the evidence to decide whether [the victim] was in fact sexually abused." *Id.* at 74. Therefore, as in *Florczak*, the majority of Ms. Haley's testimony was unobjectionable. As an expert and a treating therapist, she was properly allowed to testify about C.S.G.'s symptoms, her behaviors, her difficulties, her struggles, as well as her own experience with treating patients with PTSD and her knowledge through her education about signs and symptoms of PTSD. No objection from defense counsel to this testimony would have been sustained.

At most, Ms. Haley's brief discussion of a "diagnosis" of sexual abuse would have been objectionable. However, this testimony was brief, and harmless, and did not affect the outcome of the case. Further, Gensitskiy cannot show that it was not his attorney's trial strategy to allow the therapist's testimony to pass without objection in order to bolster his theory of the case. To demonstrate ineffective assistance of counsel based on the failure to object, the defendant must show (1) that the trial court

would have sustained the objection if raised, (2) an absence of legitimate strategic or tactical reasons for failing to object, and (3) that the result of the trial would have been different. *See State v. Johnston,* 143 Wn.App. 1, 20, 177 P.3d 1127 (2007).

Ms. Haley's testimony surrounding a diagnosis of sexual abuse is as follows:

> Well, I've offered a few diagnoses. Originally when I first met with her on November 3, 2010, I offered a diagnosis of sexual abuse of a child, which indicates she was a victim of sexual abuse. And that is how we treat children who come in through our specific sexual abuse grant.

RP 287. Even if it was not a reasonable trial strategy, Gensitskiy cannot show he suffered any prejudice. Ms. Haley's brief statement about sexual abuse diagnosis, that was not emphasized or explored further by the prosecution, caused slight, if any, prejudice. In describing her statements, Ms. Haley did not expressly assert her belief in C.S.G.'s statements, or her opinion on Gensitskiy's guilt. The lack of objection does not demonstrate ineffective assistance of counsel. Even if Gensitskiy's attorney had objected, and this issue was reviewed on the merits as opposed to through ineffective assistance of counsel, any Court would find that any potential error was harmless. Constitutional error is harmless if the untainted evidence is so overwhelming that it necessarily supports a guilty verdict. *Jones*, 71 Wn.App. at 813. A victim's testimony, on its own, is sufficient

to support a conviction. RCW 9A.44.020(1). Here, C.S.G. testified clearly about what happened to her. Her testimony was corroborated by her siblings' testimony. There is no doubt about what happened to her. Ms. Haley's brief statement, comprising one sentence out of her entire testimony, about sexual abuse diagnosis, did not tip the scales so overwhelmingly to have caused a jury who would not have otherwise convicted to convict. The evidence at trial, and C.S.G.'s testimony in particular, was so overwhelming that even without the potentially erroneous testimony, the jury would have concluded C.S.G. was telling the truth and that Gensitskiy had abused her as she testified he did. Thus the error, if any occurred, was harmless.

Furthermore, Gensitskiy has not met his burden of showing this failure to object was not strategic on the part of his attorney. This Court's scrutiny of defense counsel's performance is highly deferential; reasonableness of an attorney's actions is strongly presumed. *State v. Grier,* 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). To rebut this presumption, a defendant bears the burden of establishing the absence of any legitimate trial tactic explaining counsel's performance. *Id.* "If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel." *State v. Lord,* 117 Wn.2d 829,

883, 822 P.2d 177 (1991). To establish prejudice, the defendant must show that but for counsel's performance, the outcome would have been different. *State v. McLean,* 178 Wn.App. 236, 248, 313 P.3d 1181 (2013), 179 Wn.2d 1026 (2014).

It is well-known that objecting calls the jury's attention to evidence, and it can be viewed as an attempt to hide evidence from the jury, thus may be seen as a detriment to a defendant. For this reason, many defense attorneys do not frequently object, or sometimes choose not to object when the evidence is not overly harmful to their client's case, or when the evidence fits in with their theory of the case. Here, defense's theory of the case was that C.S.G. made up the entirety of these allegations. Gensitskiy's attorney made it clear that Ms. Haley was not an investigator, that she did not talk to C.S.G.'s family members, or find any physical evidence to corroborate C.S.G.'s claims. Defense counsel's theory was that C.S.G. was lying, not just to the jury, but to everyone, her therapist included. Therefore, any testimony from her therapist was automatically discounted and unimportant as it was all based on C.S.G.'s supposed lies. Defense counsel may have well chosen not to object to Ms. Haley's testimony because everything she said he was writing off as coming from C.S.G., the liar. So to him, and to Gensitskiy's theory of the case, Ms. Haley's testimony was of no moment. This is clearly a

reasonable strategy to take in this case, and this theme is evidenced by counsel's closing argument. *See* RP 1305-1332. Defense counsel had a legitimate and reasonable trial strategy in choosing not to object to Ms. Haley's testimony.

Gensitskiy's claim of ineffective assistance of counsel fails. As discussed above, Ms. Haley's testimony was proper and admissible, and therefore, not objectionable. Gensitskiy's trial attorney had no proper basis on which to object. Furthermore, even if the testimony was objectionable, its admission was not prejudicial and did not affect the outcome of the trial. And finally, Gensitskiy's attorney, even if the testimony was potentially objectionable, may have had a reasonable and legitimate trial strategy in choosing not to object to the testimony. Gensitskiy has the burden here to prove his attorney, whose choice not to object is presumed to be tactical, was ineffective for failing to object. Gensitskiy has not met this burden. For these reasons Gensitskiy's claim of ineffective assistance of trial counsel fails. Likewise, his claim of ineffective assistance of appellate counsel fails because he has not demonstrated that if this issue had been raised on direct appeal, he would have prevailed.

III. Gensitskiy was not denied effective assistance of trial counsel when his attorney elected not to seek severance of counts.

Gensitskiy claims that he was denied effective assistance of counsel when his trial attorney made the decision not to seek severance of his counts by victim, preferring to give the State one bite at the apple rather than five. This claim lacks merit.

The State should not be required to answer this claim because Gensitskiy has chosen not to brief it. His entire treatment of this claim is found at page 37 and the top of page 38 of his brief. He cites no legal authority for this claim. Rather, he cites to and relies entirely on the inadmissible and improper declaration of Brad Meryhew. It appears that rather than brief this issue, Mr. Maybrown hired Mr. Meryhew to brief it for him and the entirety of the legal argument and citation to authority that *should be contained in the brief* is instead found in the so-called 'declaration.' This is absurd. It flouts the order of this Court requiring Mr. Maybrown to file a brief that met the requirements of RAP 10.4 by being no longer than 50 pages. The portion of Meryhew's 'declaration' that purports to brief this issue spans six and a quarter pages, rendering Gensitskiy's brief 56 and ¼ pages should this Court choose to consider Meryhew's 'declaration' in its consideration of this issue. If this Court considers the arguments and citation to authority contained in Meryhew's 'declaration' as a substitute for argument and citation to authority that is required to be in the petitioner's brief (see *State v. Harris*, supra) then the

State hereby moves to strike Gensitskiy's Brief of Petitioner and asks this Court to require him to submit a new brief which complies with RAP 10.4.

Should this Court decide to reach the merits of this claim despite Gensitskiy's defiance of its order requiring him to submit a proper brief, the claim fails because the decision not to seek five trials rather than one was a reasonable tactical decision.

Missing from Gensitskiy's petition is a declaration from him declaring that if given the choice between multiple trials or one, he would have chosen multiple trials (perhaps as many as five). Also missing from Gensitskiy's petition is a declaration from Charles Buckley that he *did not* discuss severance with Gensitskiy, or even consider the matter. We can assume, because both Gensitskiy and Buckley failed to address this matter in their declarations, that their statements on this point would have undercut this claim. We can assume Mr. Buckley's decision not to seek severance was a tactical decision, and a reasonable one at that.

There is a strong presumption of effective representation of counsel, and the defendant has the burden to show that based on the record, there are no legitimate strategic or tactical reasons for the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). "Deficient performance is not shown by matters that go to trial strategy or tactics.' " *State v. Cienfuegos*, 144 Wn.2d 222, 227, 25

P.3d 1011 (2001) (*quoting State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996)).

As the Supreme Court explained in *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984):

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

Strickland at 689.

Reviewing courts are required to avoid "the harsh light of hindsight" to cast doubt on the outcome of a trial or the performance of trial counsel. *Harrington v. Richter*, 562 U.S. 86, 89, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011), citing *Bell v. Cone*, 535 U.S. 685, 702, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002). "The question is whether counsel made errors so fundamental that counsel was not functioning as the counsel guaranteed by the Sixth Amendment." *Harrington*, 562 U.S. at 88. "*Strickland* can function as a way to escape rules of waiver and forfeiture." *Id.* "The decision of how to expend resources properly lies with counsel. Counsel is entitled to balance limited resources in accord with effective trial tactics and strategies." *Harrington* at 89.

"To establish prejudice based on an improper joint trial, a defendant must show that a competent attorney would have moved for severance, that the motion likely would have been granted, and that there is a reasonable probability he would have been acquitted at a separate trial." *State v. Emery*, 174 Wn.2d 741, 755, 278 P.3d 653 (2012) , citing *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 711, 101 P.3d 1 (2004).

In his petition, Gensitskiy argues that his counsel should have moved to sever each of his counts by victim. This would have exposed Gensitskiy to five trials rather than one. Generally speaking, on appellate review of the denial of a motion to sever, the reviewing court should review the trial court's consideration of the relevant factors in determining the propriety of a motion to sever. A court should consider the strength of the State's evidence on each count; the clarity of defenses as to each count; the court's instructions or ability to instruct the jury to consider each count separately; and the cross-admissibility of the evidence. *State v. Russell*, 125 Wn.2d 24, 62-68, 882 P.2d 747 (1994). The presence of these four factors tends to mitigate any prejudice from joinder. *Id.* However, severance is not automatically required where evidence of one count would not be admissible in a separate trial on another count. *State v. Bythrow,* 114 Wn.2d 713, 720, 790 P.2d 154 (1990). "Even where evidence of one count would not be admissible in a separate trial of the

other count, defendant's proposition that severance is required in every case is erroneous." *Bythrow* at 720. In *State v. Hentz*, 32 Wn.App. 186, 647 P.2d 39 (1982), *rev'd in part on other grounds*, 99 Wn.2d 538, 663 P.2d 476 (1983), this Court found in a case where the defendant alleged error in the trial court's refusal to sever counts, that bare assertions that a joint trial of offenses will create a danger that the jury will accumulate evidence, or that the defendant may be embarrassed in presenting conflicting defenses, or that the jury may conclude the defendant has a propensity for crime do not satisfy the defendant's burden of demonstrating that there is substantial prejudice by the joinder of offenses when his jury was instructed to decide each count separately. *Hentz*, 32 Wn. App. at 190.

"Severance is not required simply because a defendant's chances of acquittal would be better. It is required only to prevent a demonstrable unfairness from occurring." *State v. Grisby*, 97 Wn.2d 493, 520, 647 P.3d 6 (1982). "Defendants seeking severance have the burden of demonstrating that a trial involving both counts would be so manifestly prejudicial as to outweigh the concern for judicial economy." *Bythrow* at 718, citing *State v. Smith*, 74 Wn.2d 744, 755, 446 P.2d 571 (1968), *vacated in part*, 408 U.S. 934, 92 S.Ct. 2852, 33 L.Ed.2d 747 (1972),

overruled on other grounds in State v. Gosby, 85 Wn.2d 758, 539 P.2d 680 (1975).

Here, the decision not to move to sever counts was reasonable for a number of reasons. First, the factors set forth above largely militate against severance. As to the strength of the State's evidence on each count, the counts pertaining to C.S.G. (the only counts on which Gensitskiy remains convicted had the strongest evidence by far. Contrary to Gensitskiy's assertion to the contrary in Meryhew's 'declaration,' this fact weighs against a finding of prejudice to Gensitskiy. That is, there is no concern in this case that the jury used the evidence on a stronger count to find guilt on a weaker count. Indeed, the jury acquitted Gensitskiy of the weakest counts. In this case, the counts involving C.S.G. (which are the only ones at issue in this PRP) are the counts that were very strong standing alone on which the jury would likely have returned a verdict of guilt anyway. Second, the jury was instructed to consider each count separately, and instructed that its verdict on one count should not control its verdict on any other count . CP 31. Third, the defense to each of the counts was the same: Gensitskiy didn't do it, and the allegations were the result of a combination of false memories (implanted in the others by the oldest and most influential complainant, D.S.G.) and outright lies. The lies were the result of Americanized children wanting to break free of a strict

and traditional Ukrainian father. Finally, the evidence between the counts here was cross-admissible. This case involved a common scheme in which the tyrannical Gensitskiy terrorized his children both physically and sexually over a number of years. The victims described common behaviors on the part of Gensitskiy. Even if this Court were to find that the evidence was not cross-admissible, cross-admissibility is but one factor to be looked at, and is not dispositive to the severance question. *Bythrow*, supra, at 720.

Second, even if Gensitskiy had demonstrated in this petition that severance might have been granted, that does not mean a reasonably performing attorney was required to make such a motion. By electing a single trial as opposed to as many as five, Gensitskiy was in a position to take advantage of any deficiencies in the State's presentation of its case. Perhaps certain important witnesses would fail to appear for trial, for example. Any number of things can go wrong for the State in trial. Indeed, Gensitskiy obtained *acquittals* on two of the counts charged, suggesting he was not prejudiced by the joinder of counts. Giving the State multiple opportunities to correct deficiencies and refine its arguments carries the significant risk of harming the client and exposing him to increased public condemnation and ridicule. Although a case dealing with double jeopardy,

Yeager v. United States discusses the harm suffered by a defendant upon exposure to multiple trials:

> Our cases have recognized that the Clause embodies two vitally important interests. The first is the "deeply ingrained" principle that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

Yeager v. United States, 557 U.S. 110, 117, 129 S.Ct. 2360, 174 L.Ed.2d 78 (2009). The availability of impeachment evidence grows with each successive trial where the same witnesses may be called upon to testify in each trial. Multiple trials carry more expense than a single trial, perhaps very substantial expense. In the dissent in *State v. Sutherby*, 165 Wn.2d 870, 889-90, 204 P.3d 916 (2009), a case in which the defendant, like Gensitskiy, opted to hire his own attorney, Justice Jim Johnson observed:

> Sutherby's counsel was not deficient because enduring one trial for all the charges was likely a strategic choice. Most obviously, Sutherby decided to save money by one trial, rather than two. Sutherby now has the burden of affirmatively showing that the decision was not tactical. But Sutherby's sole argument on deficiency is the bald assertion that there was "no downside" to severance. Br. of Appellant at 18. That is not a persuasive argument. First, he saved both time (under community suspicion) and money by avoiding two trials. Also, several scenarios indicate it would be no advantage to seek severance, even if granted.

Sutherby, 165 Wn.2d at 889-90, (Johnson, J., dissenting).

Finally, multiple trials resulting in multiple convictions provide the trial court with the discretion to run sentences consecutively by operation of RCW 9.94A.589(3). Following convictions in a single trial, sentences for multiple concurrent offenses must be run concurrently unless the court declares an exceptional sentence. See RCW 9.94A.589(1)(a). Opting for one trial rather than multiple trials was a legitimate tactical decision on counsel's part. Gensitskiy was not denied effective assistance of counsel when his attorney elected not to seek severance. This claim fails.

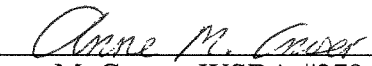
CONCLUSION

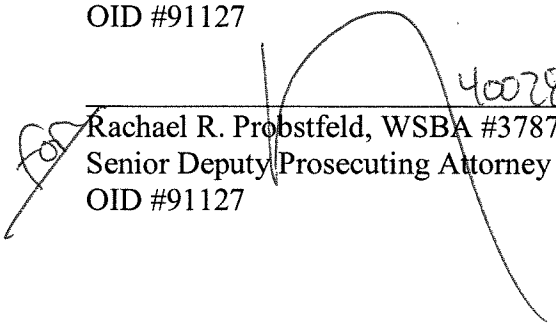
Gensitskiy fails to show either constitutional error resulting in actual and substantial prejudice or nonconstitutional error resulting in a complete miscarriage of justice. His petition should be denied.

DATED this 20th day of December 2016.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By: 
Anne M. Cruser, WSBA #27944
Senior Deputy Prosecuting Attorney
OID #91127


Rachael R. Probstfeld, WSBA #37878
Senior Deputy Prosecuting Attorney
OID #91127

APPENDIX A

198 cc: Nussbaum
jail x 2

S2

FILED
JUL 06 2015 4:19
Scott G. Weber, Clerk, Clark Co.

Superior Court of Washington
County of Clark

State of Washington, Plaintiff,

vs.

SERGEY V GENSITSKIY,
Defendant.

SID: WA26267081
If no SID, use DOB: 7/11/1963

No. 11-1-01186-1
AMENDED Felony Judgment and Sentence -- Prison
☐ **RCW 9.94A.507 Prison Confinement**
(Sex Offense and Kidnapping of a Minor)
(FJS)
☒ **Clerk's Action Required, para 2,1, 4.1, 4.3a, 4.3b, 5.2, 5.3, 5.5 and 5.7** 12-9-06026-5
☐ **Defendant Used Motor Vehicle**
☐ **Juvenile Decline** ☐ **Mandatory** ☐ **Discretionary**

I. Hearing

1.1 The court conducted a sentencing hearing this date; the defendant, the defendant's lawyer, and the (deputy) prosecuting attorney were present.

II. Findings

There being no reason why judgment should not be pronounced, in accordance with the proceedings in this case, the court ***Finds:***

2.1 Current Offenses: The defendant is guilty of the following offenses, based upon
☐ guilty plea ☒ jury-verdict 8/10/2012 ☐ bench trial :

Count	*Crime*	*RCW (w/subsection)*	*Class*	*Date of Crime*
02	CHILD MOLESTATION IN THE FIRST DEGREE	9A.44.083	FA	3/1/2001 to 2/28/2007
03	CHILD MOLESTATION IN THE SECOND DEGREE	9A.44.086	FB	3/1/2007 to 2/28/2009
04	CHILD MOLESTATION IN THE THIRD DEGREE	9A.44.089	FC	3/1/2009 to 10/1/2010
05	CHILD MOLESTATION IN THE THIRD DEGREE	9A.44.089	FC	3/1/2009 to 10/1/2010

Class: FA (Felony-A), FB (Felony-B), FC (Felony-C)
(If the crime is a drug offense, include the type of drug in the second column.)
☐ Additional current offenses are attached in Appendix 2.1a.

☐ The defendant is a sex offender subject to indeterminate sentencing under **RCW 9.94A.507.**

The jury returned a special verdict or the court made a special finding with regard to the following:

☐ The defendant engaged, agreed, offered, attempted, solicited another, or conspired to engage a victim of child rape or child molestation in sexual conduct in return for a fee in the commission of the offense in Count _____. RCW 9.94A.839.

☐ The offense was predatory as to Count _____. RCW 9.94A.836.

☐ The victim was under 15 years of age at the time of the offense in Count _____ RCW 9.94A.837.

☐ The victim was developmentally disabled, mentally disordered, or a frail elder or vulnerable adult at the time of the offense in Count _____. RCW 9.94A.838, 9A.44.010.

☐ The defendant acted with **sexual motivation** in committing the offense in Count _____. RCW 9.94A.835.

☐ This case involves **kidnapping** in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW, where the victim is a minor and the offender is not the minor's parent. RCW 9A.44.130.

☐ The defendant used a **firearm** in the commission of the offense in Count _____. RCW 9.94A.825, 9.94A.533.

☐ The defendant used a **deadly weapon other than a firearm** in committing the offense in Count _____ _____. RCW 9.94A.825, 9.94A.533.

☐ Count _____, **Violation of the Uniform Controlled Substances Act (VUCSA)**, RCW 69.50.401 and RCW 69.50.435, took place in a school, school bus, within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park, public transit vehicle, or public transit stop shelter; or in, or within 1000 feet of the perimeter of a civic center designated as a drug-free zone by a local government authority, or in a public housing project designated by a local governing authority as a drug-free zone.

☐ The defendant committed a crime involving the manufacture of methamphetamine, including its salts, isomers, and salts of isomers, **when a juvenile was present in or upon the premises of manufacture** in Count _____. RCW 9.94A.605, RCW 69.50.401, RCW 69.50.440.

☐ Count _____ is a **criminal street gang**-related felony offense in which the defendant compensated, threatened, or solicited a minor in order to involve that **minor** in the commission of the offense. RCW 9.94A.833.

☐ Count _____ is the crime of **unlawful possession of a firearm** and the defendant was a **criminal street gang** member or associate when the defendant committed the crime. RCW 9.94A.702, 9.94A.____.

☐ The defendant committed ☐ **vehicular homicide** ☐ **vehicular assault** proximately caused by driving a vehicle while under the influence of intoxicating liquor or drug or by operating a vehicle in a reckless manner. The offense is, therefore, deemed a violent offense. RCW 9.94A.030.

☐ Count _____ involves **attempting to elude** a police vehicle and during the commission of the crime the defendant endangered one or more persons other than the defendant or the pursuing law enforcement officer. RCW 9.94A.834.

☐ Count _____ is a felony in the commission of which the defendant used a **motor vehicle.** RCW46.20.285.

☐ The defendant has a **chemical dependency** that has contributed to the offense(s). RCW 9.94A.607.

☐ For crime(s) charged in Count _____ **domestic violence** was pled and proved. **RCW 10.99.020.**

☐ Counts _____ encompass the same criminal conduct and count as one crime in determining the offender score (RCW 9.94A.589).

☐ **Other current convictions listed under different cause numbers used in calculating the offender score are** (list offense and cause number):

	Crime	Cause Number	Court (county & state)
1.			

☐ Additional current convictions listed under different cause numbers used in calculating the offender score are attached in Appendix 2.1b.

2.2 Criminal History (RCW 9.94A.525):

Crime	Date of Crime	Date of Sentence	Sentencing Court (County & State)	A or J Adult, Juv.	DV?*	Type
1 No known felony convictions						

*DV: Domestic Violence was pled and proved

☐ Additional criminal history is attached in Appendix 2.2.
☐ The defendant committed a current offense while on community placement/community custody (adds one point to score). RCW 9.94A.525.
☐ The prior convictions for _____ are one offense for purposes of determining the offender score (RCW 9.94A.525).

☐ The prior convictions for _____ are not counted as points but as enhancements pursuant to RCW 46.61.520.

2.3 Sentencing Data:

Count No.	Offender Score	Seriousness Level	Standard Range (not including enhancements)	Plus Enhancements*	Total Standard Range (including enhancements)	Maximum Term	Maximum Fine
02	9	X	149 MONTHS to 198 MONTHS		149 MONTHS to 198 MONTHS	LIFE	$50,000.00
03	9	VII	87 MONTHS to 116 MONTHS		87 MONTHS to 116 MONTHS	10 YEARS	$20,000.00
04	9	V	60 months		60 months	5 YEARS	$10,000.00
05	9	V	60 months		60 months	5 YEARS	$10,000.00

* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom, see RCW 46.61.520, (JP) Juvenile present, (SM) Sexual motivation, RCW 9.94A.533(8), (SCF) Sexual conduct with a child for a fee, RCW 9.94A.533(9), (CSG) criminal street gang involving minor, (AE) endangerment while attempting to elude.
☐ Additional current offense sentencing data is attached in Appendix 2.3.

For violent offenses, most serious offenses, or armed offenders, recommended **sentencing agreements or plea agreements** are ☐ attached ☐ as follows: _____.

2.4 ☐ Exceptional Sentence. The court finds substantial and compelling reasons that justify an exceptional sentence:
☐ below the standard range for Count(s) _____.
☐ above the standard range for Count(s) _____.
☐ The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.
☐ Aggravating factors were ☐ stipulated by the defendant, ☐ found by the court after the defendant waived jury trial, ☐ found by jury, by special interrogatory.
☐ within the standard range for Count(s) _____ but served consecutively to Count(s) _____.
Findings of fact and conclusions of law are attached in Appendix 2.4. ☐ Jury's special interrogatory is attached. The Prosecuting Attorney ☐ did ☐ did not recommend a similar sentence.
☐ In the case of more than one aggravating factor, the Court finds that the same sentence would be imposed if any one of the aggravating factors is not upheld on appeal.

2.5 Ability to Pay Legal Financial Obligations. The court has considered the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds:

☐ That the defendant has the ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

☒ That the defendant is presently indigent but is anticipated to be able to pay financial obligations in the future. RCW 9.94A.753.

☐ That the defendant is indigent and disabled and is not anticipated to be able to pay financial obligations in the future. RCW 9.94A.753.

☐ Other: _____. RCW 9.94A.753.

☐ The following extraordinary circumstances exist that make restitution inappropriate. (RCW 9.94A.753):

_____.

☐ The defendant has the present means to pay costs of incarceration. RCW 9.94A.760.

III. Judgment

3.1 The defendant is ***guilty*** of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.

3.2 ☒ The court ***dismisses*** Counts 06 (CHILD MOLESTATION IN THE FIRST DEGREE), 07 (CHILD MOLESTATION IN THE FIRST DEGREE), 08 (INCEST IN THE SECOND DEGREE), 09 (INCEST IN THE SECOND DEGREE), 10 (INCEST IN THE SECOND DEGREE), 11 (INCEST IN THE SECOND DEGREE) in the charging document.

IV. Sentence and Order

It is ordered:

4.1 Confinement. The court sentences the defendant to total confinement as follows:

(a) ***Confinement.*** RCW 9.94A.589. A term of total confinement in the custody of the Department of Corrections (DOC):

198 months on Count 02 — 116 months on Count 03

60 months on Count 04 — 60 months on Count 05

☐ The confinement time on Count(s)_____ contain(s) a mandatory minimum term of _____.

☐ The confinement time on Count _____ includes _____ months as enhancement for ☐ firearm ☐ deadly weapon ☐ sexual motivation ☐ VUCSA in a protected zone ☐ manufacture of methamphetamine with juvenile present ☐ sexual conduct with a child for a fee.

Actual number of months of total confinement ordered is: 198 months.

All counts shall be served concurrently, except for the portion of those counts for which there is an enhancement as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: _____.

The sentence herein shall run consecutively with any other sentence previously imposed in any other case, including other cases in District Court or Superior Court, unless otherwise specified herein:

_____.

Confinement shall commence immediately unless otherwise set forth here: _____

The total time of incarceration and community supervision shall not exceed the statutory maximum for the crime.

(b) ***Confinement***. RCW 9.94A.507 (Sex Offenses only): The court orders the following term of confinement in the custody of the DOC:

Count	02	minimum term		maximum term	Statutory Maximum
Count	03	minimum term		maximum term	Statutory Maximum
Count	04	minimum term		maximum term	Statutory Maximum
Count	05	minimum term		maximum term	Statutory Maximum

(c) ***Credit for Time Served***: The defendant shall receive 979 days credit for time served prior to sentencing for confinement that was solely under this cause number. RCW 9.94A.505. The jail shall compute earned early release credits (good time) pursuant to its policies and procedures.

(d) ☐ ***Work Ethic Program***. RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic program. The court recommends that the defendant serve the sentence at a work ethic program. Upon completion of work ethic program, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions in Section 4.2. Violation of the conditions of community custody may result in a return to total confinement for remaining time of confinement.

4.2 Community Custody. (To determine which offenses are eligible for or required for community placement or community custody see RCW 9.94A.701)

(A) The defendant shall be on community placement or community custody for the longer of:

(1) the period of early release. RCW 9.94A.728(1)(2); or

(2) the period imposed by the court, as follows:

Count(s) 2,3,4,5, 36 months for Sex Offenses
Count(s) _____, 18 months for Violent Offenses
Count(s) _____, 12 months (for crimes against a person, drug offenses, or offenses involving the unlawful possession of a firearm by a street gang member or associate)
Count(s) _____, _____ months. RCW 9.94A.701(9)

(Sex offenses, only) For count(s) 2, sentenced under RCW 9.94A.507, for any period of time the defendant is released from total confinement before the expiration of the statutory maximum.

The total time of incarceration and community supervision/custody shall not exceed the statutory maximum for the crime.

(B) While on community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution (service); (3) notify DOC of any change in defendant's address or employment; (4) not consume controlled substances except pursuant to lawfully issued prescriptions; (5) not unlawfully possess controlled substances while on community custody; (6) not own, use, or possess firearms or ammunition; (7) pay supervision fees as determined by DOC; (8) perform affirmative acts as required by DOC to confirm compliance with the orders of the court; (9) for sex offenses, submit to electronic monitoring if imposed by DOC; and (10) abide by any additional conditions imposed by DOC under RCW 9.94A.704 and .706. The defendant's residence location and living arrangements are subject to the prior approval of DOC while on community custody. For sex offenders sentenced under RCW 9.94A.709, the court may extend community custody up to the statutory maximum term of the sentence.

The court orders that during the period of supervision the defendant shall:

☐ consume no alcohol.

☒ have no contact with: CSG.
☐ remain ☐ within ☐ outside of a specified geographical boundary, to wit:

☒ not reside within 880 feet of the facilities or grounds of a public or private school (community protection zone). RCW 9.94A.030(8).
☐ participate in the following crime-related treatment or counseling services:

☐ undergo an evaluation for treatment for ☐ domestic violence ☐ substance abuse ☐ mental health ☐ anger management, and fully comply with all recommended treatment.
☐ comply with the following crime-related prohibitions:

☒ Additional conditions are imposed in Appendix 4.2, if attached or are as follows:
See Attached Appendix A and attached Appendix F.

(C) For sentences imposed under RCW 9.94A.507, the Indeterminate Sentence Review Board may impose other conditions (including electronic monitoring if DOC so recommends). In an emergency, DOC may impose other conditions for a period not to exceed seven working days.

Court Ordered Treatment: If any court orders mental health or chemical dependency treatment, the defendant must notify DOC and the defendant must release treatment information to DOC for the duration of incarceration and supervision. RCW 9.94A.562.

4.3a Legal Financial Obligations: The defendant shall pay to the clerk of this court:

JASS CODE			
RTN/RJN	$ ____	Restitution to: _____ (Name and Address--address may be withheld and provided confidentially to Clerk of the Court's office.)	
PCV	$ 500.00	Victim assessment	RCW 7.68.035
PDV	$ _____	Domestic Violence assessment	RCW 10.99.080
CRC	~~$ 450.00~~	Court costs, including RCW 9.94A.760, 9.94A.505, 10.01.160, 10.46.190	
		Criminal filing fee $ 200.00 FRC	
		Witness costs $ _____ WFR	
		Sheriff service fees $ _____ SFR/SFS/SFW/WRF	
		Jury demand fee $250.00 JFR	
		Extradition costs $ _____ EXT	
		Other $ _____	
PUB	$ ____	Fees for court appointed attorney	RCW 9.94A.760
WFR	____	Court appointed defense expert and other defense costs	RCW 9.94A.760
	$ _____	DUI fines, fees and assessments	
FCM/MTH	~~$ 500.00~~	~~Fine~~ RCW 9A.20.021; ☐ VUCSA chapter 69.50 RCW, ☐ VUCSA additional fine deferred due to indigency RCW 69.50.430	
CDF/LDI/FCD	$ _____	Drug enforcement Fund # ☐ 1015 ☐ 1017 (TF)	RCW 9.94A.760

NTF/SAD/SDI

$ 100.00 DNA collection fee RCW 43.43.7541

CLF $_____ Crime lab fee ☐ suspended due to indigency RCW 43.43.690

FPV $_____ Specialized forest products RCW 76.48.140

RTN/RJN $_____ Emergency response costs (Vehicular Assault, Vehicular Homicide, Felony DUI only, $1000 maximum) RCW 38.52.430
Agency: _____

$_____ Other fines or costs for: _____

$_____ ***Total*** RCW 9.94A.760

☒ The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

☒ shall be set by the prosecutor.

☐ is scheduled for _____ (date).

☐ The defendant waives any right to be present at any restitution hearing (sign initials): _____.

☐ ***Restitution*** Schedule attached.

☐ Restitution ordered above shall be paid jointly and severally with:

RJN

Name of other defendant	**Cause Number**	Victim's name	Amount

The Department of Corrections (DOC) or clerk of the court shall immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760(8).

All payments shall be made in accordance with the policies of the clerk of the court and on a schedule established by DOC or the clerk of the court, commencing immediately, unless the court specifically sets forth the rate here: Not less than $ AS ESTABLISHED per month commencing _____. RCW 9.94A.760.

The defendant shall report to the clerk of the court or as directed by the clerk of the court to provide financial and other information as requested. RCW 9.94A.760(7)(b).

☐ The court orders the defendant to pay costs of incarceration at the rate of $_____ per day, (actual costs not to exceed $100 per day). (*JLR*) RCW 9.94A.760.

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160.

4.3b ☐ Electronic Monitoring Reimbursement. The defendant is ordered to reimburse _____ (name of electronic monitoring agency) at _____, for the cost of pretrial electronic monitoring in the amount of $_____.

4.4 DNA Testing. The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

☒ ***HIV Testing.*** The defendant shall submit to HIV testing. RCW 70.24.340.

4.5 No Contact:

☒ The defendant shall not have contact with, CSG (female, 3/1/1995 including, but not limited to, personal, verbal, telephonic, written or contact through a third party for two years following the expiration of the longest sentence served by the offender as a result of the prosecution.

☒ The defendant is excluded or prohibited from coming within:

☐ 500 feet ☐ 880 feet ☒ 1000 feet of:

☒ CSG (female, 3/1/1995)

☒ home/ residence ☒ work place ☒ school

☐ (other location(s)) person

☐ other location _____

for two years following the expiration of the longest sentence served by the offender as a result of the prosecution

☐ A separate Domestic Violence No-Contact Order, Antiharassment No-Contact Order, or Sexual Assault Protection Order is filed concurrent with this Judgment and Sentence.

4.6 Other: _____

4.7 Off-Limits Order. (Known drug trafficker). RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the county jail or Department of Corrections: _____

4.8 For Offenders on Community Custody, when there is reasonable cause to believe that the defendant has violated a condition or requirement of this sentence, the defendant shall allow, and the Department of Corrections is authorized to conduct, searches of the defendant's person, residence, automobile or other personal property. Residence searches shall include access, for the purpose of visual inspection, all areas of the residence in which the defendant lives or has exclusive/joint control/access and automobiles owned or possessed by the defendant.

4.9 If the defendant is removed/deported by the U.S. Immigration and Customs Enforcement, the Community Custody time is tolled during the time that the defendant is not reporting for supervision in the United States. The defendant shall not enter the United States without the knowledge and permission of the U.S. Immigration and Customs Enforcement. If the defendant re-enters the United States, he/she shall immediately report to the Department of Corrections if on community custody or the Clerk's Collections Unit, if not on Community Custody for supervision.

V. Notices and Signatures

5.1 Collateral Attack on Judgment. If you wish to petition or move for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, you must do so within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.

5.2 Length of Supervision. If you committed your offense prior to July 1, 2000, you shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. If you committed your offense on or after July 1, 2000, the court shall retain jurisdiction over you, for the purpose of your compliance

with payment of the legal financial obligations, until you have completely satisfied your obligation, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505(5). The clerk of the court has authority to collect unpaid legal financial obligations at any time while you remain under the jurisdiction of the court for purposes of your legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).

5.3 Notice of Income-Withholding Action. If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections (DOC) or the clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606.

5.4 Community Custody Violation.

(a) If you are subject to a first or second violation hearing and DOC finds that you committed the violation, you may receive as a sanction up to 60 days of confinement per violation. RCW 9.94A.633.

(b) If you have not completed your maximum term of total confinement and you are subject to a third violation hearing and DOC finds that you committed the violation, DOC may return you to a state correctional facility to serve up to the remaining portion of your sentence. RCW 9.94A.714.

5.5a Firearms. **You may not own, use or possess any firearm, and under federal law any firearm or ammunition,** unless your right to do so is restored by the court in which you are convicted or the superior court in Washington State where you live, and by a federal court if required. **You must immediately surrender any concealed pistol license.** (The clerk of the court shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040 and RCW 9.41.047.

5.5b ☐ Felony Firearm Offender Registration. The defendant is required to register as a felony firearm offender. The specific registration requirements are in the "Felony Firearm Offender Registration" attachment.

5.6 Sex and Kidnapping Offender Registration Laws of 2010, ch. 367 § 1, 10.01.200.

1. General Applicability and Requirements: Because this crime involves a sex offense or a kidnapping offense involving a minor as defined in Laws of 2010, ch. 367 § 1, you are required to register.

If you are a resident of Washington you must register with the sheriff of the county of the state of Washington where you reside. You must register within three business days of being sentenced unless you are in custody, in which case you must register at the time of your release with the person designated by the agency that has jurisdiction over you. You must also register within three business days of your release with the sheriff of the county of the state of Washington where you will be residing.

If you are not a resident of Washington but you are a student in Washington, or you are employed in Washington, or you carry on vocation in Washington, you must register with the sheriff of the county of your school, place of employment, or vocation. You must register within three business days of being sentenced unless you are in custody, in which case you must register at the time of your release with the person designated by the agency that has jurisdiction over you. You must also register within three business days of your rlease with the sheriff of the county of your school, where you are employed, or where you carry on a vocation.

2. Offenders Who are New Residents or Returning Washington Residents: If you move to Washington or if you leave the state following your sentencing or release from custody but later move back to Washington, you must register within three business days after moving to this state. If you leave this state following your sentencing or release from custody but later while not a resident of Washington you become employed in Washington, carry on a vocation in Washington, or attend school in Washington, you must register within three business days after starting school in this state or becoming employed or carrying out a vocation in this state.

3. Change of Residence Within State: If you change your residence within a county, you must provide, by certified mail, with return receipt requested or in person, signed written notice of your change of residence to the sheriff within three business days of moving. If you change your residence to a new county within this state, you must register with the sheriff of the new county within three business days of moving. Also within three business days, you must provide, by certified mail, with reutrn receipt requested or in

person, signed written notice of your change of address to the sheriff of the county where you registered.

4. Leaving the State or Moving to Another State: If you move to another state, or if you work, carry on a vocation, or attend school in another state you must register a new address, fingerprints, and photograph with the new state within three business days after establishing residence, or after beginning to work, carry on a vocation, or attend school in the new state. If you move out of the state, you must also send written notice within three business days of moving to the new state or to a foreign country to the county sheriff with whom you last registered in Washington State.

5. Notification Requirement When Enrolling in or Employed by a Public or Private Institution of Higher Education or Common School (K-12): If you are a resident of Washington and you are admitted to a public or private institution of higher education, you are required to notify the sheriff of the county of your residence of your intent to attend the institution within three business days prior to arriving at the institution. If you become employed at a public or private institution of higher education, you are required to notify the sheriff for the county of your residence of your employment by the institution within three business days prior to beginning to work at the institution. If your enrollment or employment at a public or private institution of higher education is terminated, you are required to notify the sheriff for the county of your residence of your termination of enrollment or employment within three business days of such termination. If you attend, or plan to attend, a public or private school regulated under Title 28A RCW or chapter 72.40 RCW, you are required to notify the sheriff of the county of your residence of your intent to attend the school. You must notify the sheriff within three business days prior to arriving at the school to attend classes. The sheriff shall promptly notify the principal of the school.

6. Registration by a Person Who Does Not Have a Fixed Residence: Even if you do not have a fixed residence, you are required to register. Registration must occur within three business days of release in the county where you are being supervised if you do not have a residence at the time of your release from custody. Within three business days after losing your fixed residence, you must send signed written notice to the sheriff of the county where you last registered. If you enter a different county and stay there for more than 24 hours, you will be required to register with the sheriff of the new county not more than three business days after entering the new county. You must also report weekly in person to the sheriff of the county where you are registered. The weekly report shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. You must keep an accurate accounting of where you stay during the week and provide it to the county sheriff upon request. The lack of a fixed residence is a factor that may be considered in determining an offender's risk level and shall make the offender subject to disclosure of information to the public at large pursuant to RCW 4.24.550.

7. Application for a Name Change: If you apply for a name change, you must submit a copy of the application to the county sheriff of the county of your residence and to the state patrol not fewer than five days before the entry of an order granting the name change. If you receive an order changing your name, you must submit a copy of the order to the county sheriff of the county of your residence and to the state patrol within three business days of the entry of the order. RCW 9A.44.130(7).

8. Length of Registration:

☒ Class A felony – Life; ☐ Class B Felony – 15 years; ☐ Class C felony – 10 years

5.7 Motor Vehicle: If the court found that you used a motor vehicle in the commission of the offense, then the Department of Licensing will revoke your driver's license. The clerk of the court is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke your driver's license. RCW 46.20.285.

5.8 Other: _____.

5.9 Persistent Offense Notice

The crime(s) in count(s) 2, 3 is/are "most serious offense(s)." Upon a third conviction of a "most serious offense", the court will be required to sentence the defendant as a persistent offender to life imprisonment without the possibility of early release of any kind, such as parole or community custody. RCW 9.94A.030, 9.94A.570

The crime(s) in count(s) _____ is/are one of the listed offenses in RCW 9.94A.030.(31)(b). Upon a second conviction of one of these listed offenses, the court will be required to sentence the defendant as a persistent offender to life imprisonment without the possibility of early release of any kind, such as parole or community custody.

Done in Open Court and in the presence of the defendant this date: July 6, 2015.

Judge/Print Name: David Gregerson

Deputy Prosecuting Attorney	Attorney for Defendant	Defendant
WSBA No. 36726	WSBA No. ~~09048~~ 11140	Print Name:
Print Name: Anna M. Klein	Print Name: ~~Charles H. Buckley~~ LENELL NUSSBAUM	SERGEY V GENSITSKIY

Voting Rights Statement: I acknowledge that I have lost my right to vote because of this felony conviction. If I am registered to vote, my voter registration will be cancelled.

My right to vote is provisionally restored as long as I am not under the authority of DOC (not serving a sentence of confinement in the custody of DOC and not subject to community custody as defined in RCW 9.94A.030). I must re-register before voting. The provisional right to vote may be revoked if I fail to comply with all the terms of my legal financial obligations or an agreement for the payment of legal financial obligations.

My right to vote may be permanently restored by one of the following for each felony conviction: a) a certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) a court order issued by the sentencing court restoring the right, RCW 9.92.066; c) a final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) a certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 29A.84.660. Registering to vote before the right is restored is a class C felony, RCW 29A.84.140.

Defendant's signature: Refused

I am a certified or registered interpreter, or the court has found me otherwise qualified to interpret, in the _____ _____ language, which the defendant understands. I interpreted this Judgment and Sentence for the defendant into that language.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed at Vancouver, Washington on (date): _____

_____ Interpreter

_____ Print Name

I, Scott G. Weber, Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action now on record in this office.

Witness my hand and seal of the said Superior Court affixed this date: _____.

Clerk of the Court of said county and state, by: _____, Deputy Clerk

Identification of the Defendant

SERGEY V GENSITSKIY

11-1-01186-1

SID No: WA26267081 (If no SID take fingerprint card for State Patrol)

Date of Birth: 7/11/1963

FBI No. 136134MD3

Local ID No. 207241

PCN No. _____

Other _____

Alias name, DOB:

Race: W **Ethnicity:** **Sex:** M

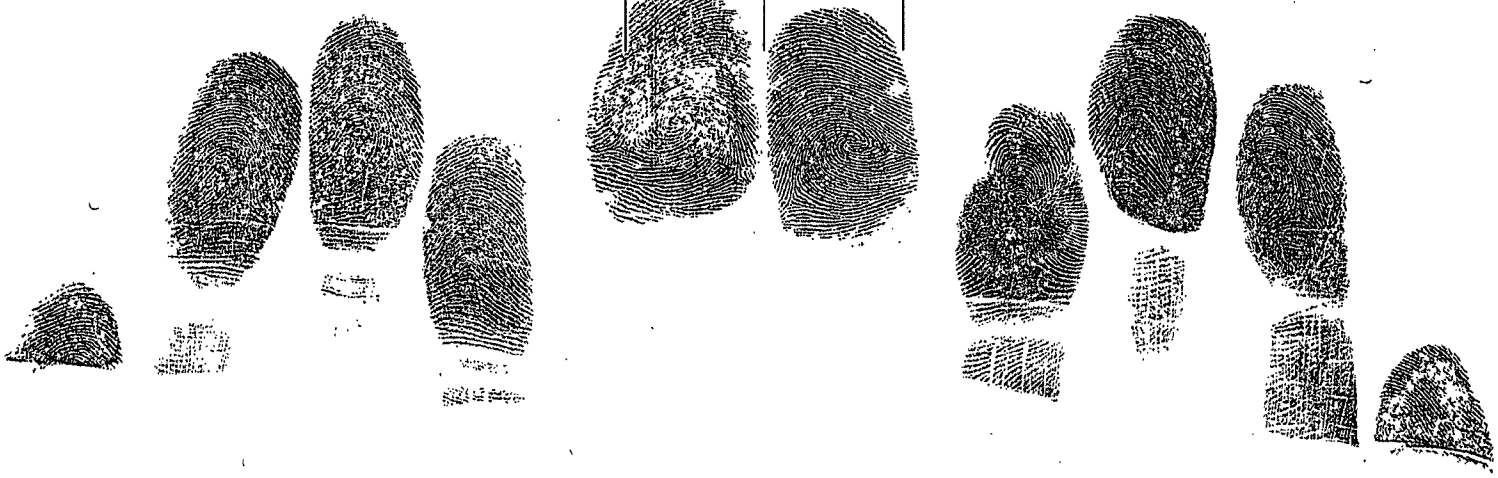
Fingerprints: I attest that I saw the same defendant who appeared in court on this document affix his or her fingerprints and signature thereto.

Clerk of the Court, Deputy Clerk, S. Vigrali Dated: 7/16/15

Seal of the Superior Court STATE OF WASHINGTON Of Clark County

The defendant's signature: Refused

Left four fingers taken simultaneously	Left Thumb	Right Thumb	Right four fingers taken simultaneously



SUPERIOR COURT OF WASHINGTON - COUNTY OF CLARK

STATE OF WASHINGTON, Plaintiff, v. SERGEY V GENSITSKIY, Defendant. SID: WA26267081 DOB: 7/11/1963	NO. 11-1-01186-1 **AMENDED WARRANT OF COMMITMENT TO STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS**

THE STATE OF WASHINGTON, to the Sheriff of Clark County, Washington, and the State of Washington, Department of Corrections, Officers in charge of correctional facilities of the State of Washington:

GREETING:

WHEREAS, the above-named defendant has been duly convicted in the Superior Court of the State of Washington of the County of Clark of the crime(s) of:

COUNT	CRIME	RCW	DATE OF CRIME
02	CHILD MOLESTATION IN THE FIRST DEGREE	9A.44.083	3/1/2001 to 2/28/2007
03	CHILD MOLESTATION IN THE SECOND DEGREE	9A.44.086	3/1/2007 to 2/28/2009
04	CHILD MOLESTATION IN THE THIRD DEGREE	9A.44.089	3/1/2009 to 10/1/2010
05	CHILD MOLESTATION IN THE THIRD DEGREE	9A.44.089	3/1/2009 to 10/1/2010

and Judgment has been pronounced and the defendant has been sentenced to a term of imprisonment in such correctional institution under the supervision of the State of Washington, Department of Corrections, as shall be designated by the State of Washington, Department of Corrections pursuant to RCW 72.13, all of which appears of record; a certified copy of said judgment being endorsed hereon and made a part hereof,

NOW, THIS IS TO COMMAND YOU, said Sheriff, to detain the defendant until called for by the transportation officers of the State of Washington, Department of Corrections, authorized to conduct defendant to the appropriate facility, and this is to command you, said Superintendent of the appropriate facility to receive defendant from said officers for confinement, classification and placement in such correctional facilities under the supervision of the State of Washington, Department of Corrections, for a term of confinement of :

COUNT	CRIME	TERM
02	CHILD MOLESTATION IN THE FIRST DEGREE	198 Days/Months
03	CHILD MOLESTATION IN THE SECOND DEGREE	116 Days/Months
04	CHILD MOLESTATION IN THE THIRD DEGREE	60 Days/Months
05	CHILD MOLESTATION IN THE THIRD DEGREE	60 Days/Months

These terms shall be served concurrently to each other unless specified herein:

The defendant has credit for 979 days served.

The term(s) of confinement (sentence) imposed herein shall be served consecutively to any other term of confinement (sentence) which the defendant may be sentenced to under any other cause in either District Court or Superior Court unless otherwise specified herein:

And these presents shall be authority for the same.

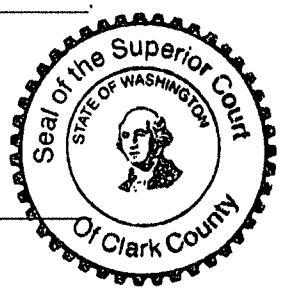
HEREIN FAIL NOT.

WITNESS, Honorable David Gregg

JUDGE OF THE SUPERIOR COURT AND THE SEAL THEREOF THIS DATE: 7/6/15

SCOTT G. WEBER, Clerk of the
Clark County Superior Court

By: J. Nguyen
Deputy



"APPENDIX A"
9.94A.507

CONDITIONS OF SENTENCE/COMMUNITY CUSTODY

1. You shall commit no law violations.

2. You shall report to and be available for contact with the assigned community corrections officer as directed.

3. You shall work at a Department of Corrections approved education program, employment program, and/or community service program as directed.

4. You shall not possess, consume, or deliver controlled substances, except pursuant to a lawfully issued prescription.

5. You shall pay a community placement/supervision fee as determined by the Department of Corrections.

6. You shall not have any direct or indirect contact with the victims, including but not limited to personal, verbal, telephonic, written, or through a third person without prior written permission from his community corrections officer, his therapist, the prosecuting attorney, and the court only after an appropriate hearing. This condition is for the statutory maximum sentence of LIFE with C.S.G.
, and shall also apply during any incarceration.

   VIOLATION OF THIS ORDER IS A CRIMINAL OFFENSE UNDER CHAPTER 10.99 RCW AND WILL SUBJECT THE VIOLATOR TO ARREST; ANY ASSAULT OR RECKLESS ENDANGERMENT THAT IS A VIOLATION OF THIS ORDER IS A FELONY.

7. You shall not enter into or frequent business establishments or areas that cater to minor children without being accompanied by a responsible adult. Such establishments may include but are not limited to video game parlors, parks, pools, skating rinks, school grounds, malls or any areas routinely used by minors as areas of play/recreation.

8. You shall not have any contact with minors.* This provision begins at time of sentencing. This provision shall not be changed without prior written approval by the community corrections officer, the therapist, the prosecuting attorney, and the court after an appropriate hearing. * except in writing or on the telephone

9. You shall remain within, or outside of, a specified geographical boundary as ordered by your community corrections officer.

10. Your residence location and living arrangements shall be subject to the prior approval of your community corrections officer and shall not be changed without the prior knowledge and permission of the officer.

11. You must consent to allow home visits by Department of Corrections to monitor compliance with supervision. This includes search of the defendant's person, residence, automobile, or other personal property, and home visits include access for the purposes of inspection of all areas the defendant lives or has exclusive/joint control or access. RCW 9.94A.631

12. Your employment locations and arrangements shall be subject to prior approval of your community corrections officer and shall not be changed without the prior knowledge and permission of the officer.

13. You shall not possess, use, or own any firearms or ammunition.

14. ☐ You shall not possess or consume alcohol.

15. ☐ You shall submit to urine, breath, or other screening whenever requested to do so by the program staff or your community corrections officer.

16. ☐ You shall not possess any paraphernalia for the use of controlled substances.

17. ☐ You shall not be in any place where alcoholic beverages are the primary sale item.

18. ☐ You shall take antabuse per community corrections officer's direction.

19. You shall attend an evaluation for ☐drugs, ☐alcohol, ☐mental health, ☒anger management and ☒parenting and shall attend and successfully complete all phases of any recommended treatment as established by the community corrections officers and/or treatment facility.

20. You shall enter into, cooperate with, fully attend and successfully complete all inpatient and outpatient phases of a Washington State certified sexual deviancy treatment program as established by the community corrections officer and/or the treatment facility. You shall not change sex offender treatment providers or treatment conditions without first notifying the prosecutor, community corrections officer and shall not change providers without court approval after a hearing if the prosecutor and/or community corrections officer object to the change. "Cooperate with" means you shall follow all treatment directives, accurately report all sexual thoughts, feelings and behaviors in a timely manner and cease all deviant sexual activity.

21. The sex offender therapist shall submit quarterly reports on your progress in treatment to the court, Department of Corrections, and prosecutor and you shall execute a release of information to the community corrections officer, prosecutor and the court so that the treatment provider can discuss the case with them. The quarterly report shall reference

the treatment plan and include the following, at a minimum: dates of attendance, your compliance with requirements, treatment activities, and your relative progress in treatment.

22. During the time you are under order of the court, you shall, at your own expense, submit to polygraph examinations at the request of the Community Corrections Order and/or the Prosecuting Attorney's office (but in no event less than twice yearly). Copies shall be provided to the Prosecuting Attorney's office upon request. Such exams will be used to ensure compliance with the conditions of community supervision/placement, and the results of the polygraph examination can be used by the State in revocation hearings.

23. You shall submit to plethysmography exams, at your own expense, at the direction of the community corrections officer and copies shall be provided to the Prosecutor's Office upon request.

24. You shall register as a sex offender with the County Sheriff's Office in the county of residence as defined by RCW 9.94A.030.

25. You shall not use/possess sexually explicit material as defined in RCW 9.68.130(2).

26. You shall sign necessary release information documents as required by Department of Corrections or the Prosecuting Attorney, to monitor your compliance with any of the conditions of this Judgment and Sentence. And, you shall stipulate that the Prosecuting Attorney can disseminate copies of any psychosexual evaluations and polygraph tests in this matter to the ISRB.

27. If the offense was committed on or after July 24, 2005, you may not reside within eight hundred eighty (880) feet of the facilities and grounds of a public or private school. RCW 9.94A.030

The undersigned defendant agrees that he has read this Appendix A, or it has been read and explained to him; that he understands it and has no questions about it.

Dated: _____ Signed: Refused

Print name: SERGEY V GENSITSKIY
Defendant

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON	)	**Cause No.:** 11-1-01186-1
	)	
Plaintiff	)	**JUDGMENT AND SENTENCE (FELONY)**
v.	)	**APPENDIX F**
Sergey V. GENSITSKIY	)	**ADDITIONAL CONDITIONS OF SENTENCE**
Defendant	)	
	)	
DOC No. 359966	)	

CRIME RELATED CONDITIONS:

- No victim contact
- Complete a certified sex offender treatment program
- No contact with minors under the age of eighteen except in writing or on the telephone.
- Notify the Department of Corrections prior to any address change
- No unauthorized use of internet or web media
- Submit to polygraph examinations at the direction of the Community Corrections Officer
- Submit to urine and/or breath screening at the direction of the Community Corrections Officer

July 6, 2015
DATE

JUDGE, CLARK COUNTY SUPERIOR COURT

cc/cc/09-130.rtf
09/25/12

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION TWO

IN THE MATTER OF PERSONAL RESTRAINT OF SERGEY GENSITSKIY

No. 49044-7-II

DECLARATION OF ANNA KLEIN

STATE OF WASHINGTON)
: ss.
COUNTY OF CLARK)

I, Anna M. Klein, certify and declare as follows:

1. I am a Deputy Prosecuting Attorney for Clark County.

2. Clark County Superior Court Local Rule 47 allows attorneys to review juror questionnaires in advance of trial.

3. In my experience it is common practice for attorneys to seek an order ex parte from the court allowing them to review the jury book.

4. Generally such orders are brought to the courthouse for signature by an available judge by the Prosecutor's Office's "runner," a person who's assigned the daily

CLARK COUNTY PROSECUTING
ATTORNEY'S OFFICE
1013 FRANKLIN STREET
PO BOX 5000
VANCOUVER, WA 98666
(360) 397-2261

task of getting court documents signed by judges, filing documents with the court and delivering items to the courthouse or other buildings of the prosecutor's office.

5. In 2012, when this trial was held, it was my practice to send these orders with the court runner for signature by a judge.

6. I have also on occasion sent these orders over for signature by another staff member other than the runner if I missed the deadline for having the runner take them.

7. It has never been my practice to personally bring these orders over to a judge for signature, other than to possibly present one at the readiness hearing for the case being heard.

8. In this case I did not personally bring the order to the judge for signature.

9. When sending these orders over for signature, I would not make any sort of argument that they should be granted.

DECLARATION: I declare and certify under penalty of perjury under the laws of the State of Washington that the preceding is true and correct to the best of my knowledge.

Executed at Vancouver, Washington on this 13th day of December, 2016.

Anna M. Klein, WSBA #36726
Deputy Prosecuting Attorney

CLARK COUNTY PROSECUTING
ATTORNEY'S OFFICE
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VANCOUVER, WA 98666
(360) 397-2261

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

IN THE MATTER OF PERSONAL RESTRAINT	No. 49044-7-II
OF SERGEY GENSITSKIY	DECLARATION OF GAYLE HUTTON

STATE OF WASHINGTON)
: ss
COUNTY OF CLARK)

I, Gayle Hutton, certify and declare as follows:

1. I have been a Legal Assistant since 2002 in the Docket Unit, Drug Unit, Children's Justice Center and Major Crimes Unit trial teams. As part of my job duties, I am routinely asked to prepare Jury Book Orders on cases that are being called ready for trial in Superior Court. Prior to my employment by Clark County Prosecutor's Office, I worked as a Legal Assistant for criminal defense attorneys in Clark County. Jury Books Orders were occasionally requested by those employers as well.
2. The process for Jury Book orders historically is as follows: if the assigned Deputy Prosecuting Attorney for the case requests a jury book, an order is prepared and it is sent in our internal court run to be signed by a Judge. Once the order is signed we file a copy with the Clerk's office, and provide a conformed copy to the jury coordinator for the County. When the jury book has been compiled, we are notified by the coordinator's office and we pick up a copy of the jury book for our office.

///

CLARK COUNTY PROSECUTING ATTORNEY
1013 FRANKLIN STREET • PO BOX 5000
VANCOUVER, WASHINGTON 98666-5000
(360) 397-2261 (OFFICE)
(360) 397-2230 (FAX)

DECLARATION: I declare and certify under penalty of perjury under the laws of the State of Washington that the preceding is true and correct to the best of my knowledge.

Executed at Vancouver, Washington this 19 day of December, 2016.

Gayle A. Hutton
Legal Assistant

CLARK COUNTY PROSECUTING ATTORNEY
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VANCOUVER, WASHINGTON 98666-5000
(360) 397-2261 (OFFICE)
(360) 397-2230 (FAX)

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION TWO

IN THE MATTER OF PERSONAL RESTRAINT OF SERGEY GENSITSKIY	No. 49044-7-II DECLARATION OF JAMES SMITH

STATE OF WASHINGTON)
: ss.
COUNTY OF CLARK)

I, JAMES B. SMITH, certify and declare as follows:

1. I am employed as a deputy prosecuting attorney for Clark County. I am currently assigned to the Major Crimes Unit with the Prosecuting Attorney.

2. Clark County Superior Court Local Rule 47 requires a court order for an attorney to review juror questionnaires outside the courtroom or office of the Superior Court Administrator. While the rule expressly contemplates that attorneys may view the questionnaires at the courthouse, in my experience many attorneys chose to obtain an order to review the questionnaires at their offices.

3. In my experience, an attorney, either for the defendant or the prosecution, will present an order to the court allowing outside review of the questionnaires. This order is often presented at the readiness hearing the week before trial, but is also sometimes presented ex parte.

4. In my personal experience, criminal defense attorneys in Clark County are aware of the process to view jury questionnaires at the courthouse or to obtain approval

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to review them elsewhere. I have personally had multiple criminal defense attorneys request permission to remove the jury questionnaire either via pretrial motions in limine, at the readiness hearing, or otherwise. These requests have always been granted by the court.

DECLARATION: I declare and certify under penalty of perjury under the laws of the State of Washington that the preceding is true and correct to the best of my knowledge.

Executed at Vancouver, Washington on this 19th day of December, 2016.

JAMES B. SMITH, WSBA #35537
Deputy Prosecuting Attorney

CLARK COUNTY PROSECUTING ATTORNEY
1013 FRANKLIN STREET • PO BOX 5000
VANCOUVER, WASHINGTON 98666-5000
(360) 397-2261 (OFFICE)
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APPENDIX C

10 cc

FILED

2016 NOV -2 AM 11:02

SCOTT G. WEBER, CLERK
CLARK COUNTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON, Plaintiff, v. CRAWFORD, SHAWN, Defendant.	Cause No.: 15-1-00517-1 DEFENDANT'S MOTIONS IN LIMINE; REQUEST FOR OFFERS OF PROOF & ORDER(S) OF THE COURT

The defendant, Shawn Crawford, through counsel, Matthew R. Hoff, moves the court:

1. To Exclude Witnesses:

To order that all witnesses not actively testifying should remain outside the courtroom as provided by ER 615. If the State is choosing to have one officer stay in the courtroom to assist, the defense requests that the designated officer be called to testify first. Pursuant to ER 611(a), the Court may order the testimony in a manner most "effective for the ascertainment of the truth."

_____ Granted _____ Denied _____ Reserved

2. To Admonish Witnesses Not to Testify to the Ultimate Issue and to Not to Discuss Their Testimony or Anything Else About this case with each other. The defense moves the court:

a. To direct that the State tell its witnesses not to disclose or discuss their testimony or anything else about this case with each other.

Matthew R. Hoff, Attorney at Law
2901 Main Street, Vancouver, WA 98663
Tel: 360-693-6228; Fax: 360-258-0031

LF

_____ Granted _____ Denied _____ Reserved

b. To direct that the State tell its witnesses that they are to testify as to their personal observations and not to testify in a conclusory fashion or use terms that go to the ultimate issue at trial and thus invade the province of the jury.

_____ Granted _____ Denied _____ Reserved

c. To direct that neither the State nor its witnesses use the following terms to describe the alleged incident, the defendant or witness/es: "victim", "suspect" or "perpetrator".

_____ Granted _____ Denied _____ Reserved

d. To direct the City to tell its witnesses especially police officers not to volunteer information or answers beyond the question asked. State v. Lehman, 8 Wn.App. 408 (1975).

_____ Granted _____ Denied _____ Reserved

3. To Exclude ER 404(b) Evidence:

a. Notice and Admissibility: Under ER 404(b), "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident".

The defense has requested notice of ER 404(b) evidence in this case. The defense's omnibus application reads, "[d]isclose whether it will rely on prior acts or convictions of a similar nature for proof of knowledge or intent. See ER 404(b) a. If yes, what prior convictions or acts: _____ b. If yes, defendant hereby demands a pre-trial 404(b) hearing. Defense is opposed to 404(b) hearing set for the day of trial." The defense moves the court to direct the

Matthew R. Hoff, Attorney at Law
2901 Main Street, Vancouver, WA 98663
Tel: 360-693-6228; Fax: 360-258-0031

State to inform its witnesses not to testify to any such evidence at trial. Nor should the State attempt to elicit any such evidence at trial from witnesses.

_____ Granted _____ Denied _____ Reserved

b. Limiting Instruction, if the court were to allow the State to elicit such information over the defense's objection, the defense asks for a limiting instruction. State v. Brown, 113 Wn.2d 520 (1989); WPIC 5.05.

4. To Suppress Any Custodial Statements and/or Admission made by the Defendant under CrR 3.5.

a. Notice and Admissibility: A hearing to determine the admissibility of such statements is required pursuant to CrR 3.5.

_____ Granted _____ Denied _____ Reserved

5. To Preclude the Prosecutor from Committing the Following Forms of Misconduct

a. Arguing questions or law not covered by instructions. State v. Papadopoulos, 34 Wn.App. 397 (1983); State v. Estill, 80 Wn.2d 196 (1972); State v. Brown, 35 Wn.2d 397 (1949).

_____ Granted _____ Denied _____ Reserved

b. Arguing law which conflicts with the Court's instructions under State v. Davenport, 100 Wn.2d 757 (1984).

_____ Granted _____ Denied _____ Reserved

c. That he or she believes the testimony of the State's witness. State v. Sargent, 40 Wn.App. 340 (1985); United States v. Young, 84 L. Ed 2D 1 (1985).

_____ Granted _____ Denied _____ Reserved

Matthew R. Hoff, Attorney at Law
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d. Vouching for the credibility of a witness. State v. Reed, 102 Wn. 2d 140 (1984).

_____ Granted _____ Denied _____ Reserved

e. Term witness testimony as fabrication or a lie, even if qualified by the terms, "the evidence shows". State v. Martin, 41 Wn.App. 133, 140 (1985). This includes asking the jury in voire dire or closing whether the State should call a witness to testify if the State does not believe the witness is telling the truth.

_____ Granted _____ Denied _____ Reserved

f. Expressing a personal opinion of defendant's guilt. United States v. Young, 84 L.Ed.2d 1 (1985)

_____ Granted _____ Denied _____ Reserved

g. Shifting the burden to the defense by suggesting the defense could have called or subpoenaed witnesses or by asking the jury where a defense witness is. State v. Fowler, 114 Wn.2d 59 (1990).

_____ Granted _____ Denied _____ Reserved

h. That the defense has a good attorney who would not have overlooked an opportunity to present helpful, admissible evidence. State v Cleveland, 58 Wn.App. 634 (1990).

_____ Granted _____ Denied _____ Reserved

i. Asking any witness to express an opinion about whether another witness is lying, including asking this question of the defendant. State v. Stover, 67 Wn.App. 228 (1992); State v. Padilla, 69 Wn.App. 295 (1993).

_____ Granted _____ Denied _____ Reserved

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c. Offering any evidence on whether or not the accused exercised his right to remain silent and making any argument on this issue as being an impermissible comment on his right to remain silent. State v. Belgarde, 110 Wn.2d 504 (1989).

_____ Granted _____ Denied _____ Reserved

d. Asserting as fact, any statement or assertion of fact propounded to the witness by the complainant in this case.

_____ Granted _____ Denied _____ Reserved

e. To prevent the prosecutor from cross examining the defendant about whether the defendant believes the allegation is fabricated or arguing about fabrication. State v. Boehning, 127 Wn.App. 511 (2005).

_____ Granted _____ Denied _____ Reserved

f. Testimony as to reputation or opinion of defendant by any State witness unless and until an offer of proof is made as to the foundational requirements for such testimony.

_____ Granted _____ Denied _____ Reserved

g. Testimony of reputation evidence of any alleged witnesses for truth or veracity.

_____ Granted _____ Denied _____ Reserved

h. Testimony from any witness as to whether or not it is or is not easy for the witness to testify about the incidents on trial because they are emotionally upsetting and thereby creating sympathy for the witness and the State in the eyes of the jury.

_____ Granted _____ Denied _____ Reserved

j. To prevent the State from putting any words into the mouths of any witness by improperly cross-examining the witness with respect to any prior statements that the witness made to the prosecutor, the police or any other member of the prosecuting attorney's office, i.e.,

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that the State be required to phrase its questions in an appropriate manner not requiring the defense to pose an objection to the form of the question: For example, "what did you hear the person say?" as opposed to the highly objectionable, "didn't you tell Officer that you heard the person say ...?" or "Do you remember the subject saying '...'?"

_____ Granted _____ Denied _____ Reserved

k. To prevent the State from inquiring of any witness as to the credibility of another witness on cross-examination. (United States v. Henke, 222 F.3d 633 (9th Cir., 2002)), or from calling any other witness to bolster the credibility of a state witness on rebuttal (United States v. Richter, 826 F.2d 206 (2d Cir. 1987). See also United States v. Sullivan, 85 F.3d 743 (1st Cir. 1996); United States v. Boyd, 54 F.3d 868 (DC Cir. 1995); United State v. Sanchez-Lima, F.3d 543 (9th Cir. 1998).

_____ Granted _____ Denied _____ Reserved

l. Expressing any opinion as to the character, nature or personality of the named defendant.

_____ Granted _____ Denied _____ Reserved

7. Testimony by "Experts":

a. No expert opinion is admissible unless the witness has first been qualified by showing that he or she has sufficient expertise to state a helpful and meaningful opinion.

_____ Granted _____ Denied _____ Reserved

b. After the proponent asks questions designed to bring out the expert's qualifications the opponent should also be allowed to question the witness about his or her qualifications. City of Bellevue v. Lightfoot, 75 Wn.App. 214 (1994).

_____ Granted _____ Denied _____ Reserved

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c. In a criminal case, an expert's testimony should not exceed the limits of the underlying science or art. If the experts opinion is based upon a scientific theory or method, the theory or method should be one that is generally accepted in the scientific community. Frye v. United State's, 293 Fed. 1013 (D.C. Cir, 1923).

.

_____ Granted _____ Denied _____ Reserved

d. In the event, the court qualifies a witness as an expert, the defense moves in limine to prohibit the witness from offering opinion that is nothing more than conjecture or speculation or if it based upon unwarranted assumptions.

_____ Granted _____ Denied _____ Reserved

e. Furthermore, the defense respectfully requests that proper foundation be made outside the presence of the jury to determine whether the "expert" is in fact an expert qualified to render a meaningful opinion.

_____ Granted _____ Denied _____ Reserved

f. Finally, if the experts opinion is based upon a scientific theory or method, the theory or method should be one that is generally accepted in the scientific community. Frye v. United State's, 293 Fed. 1013 (D.C. Cir, 1923).

_____ Granted _____ Denied _____ Reserved

8. Miscellaneous Motion(s) in Limine:

a. Defense moves the court to preclude evidence of defendant's alleged ties to gangs and gang activity. There is no evidence from the state the alleged incident in the case-at-bar is gang related. As such, alleged evidence of defendant's alleged involvement with a gang is irrelevant, immaterial and prejudicial, confusing and a waste of time under ER 401, ER 402, ER 403.

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_____ Granted _____ Denied _____ Reserved

b. Defense moves to exclude any and all statements made by Reiko Romeo to both law enforcement and other witnesses in this case. It is counsel's understanding, Reiko Romeo is deceased. Permitting the State at trial to use his statements as evidence would violate Crawford's right to confrontation under the 6th Amendment to the United States Constitution. Permitting the State to introduce these statements at trial would also be in contravention of Article 1, Section 3 of the Washington State Constitution and the 14th Amendment to the United States Constitution regarding the defendant's right to due process and fair trial.

_____ Granted _____ Denied _____ Reserved

c. Defense moves to exclude purported images of Shawn Crawford posing with alleged guns discovered on a FaceBook page alleged to be created by Shawn Crawford and a cell phone alleged to be owned by Shawn Crawford. The mages are irrelevant and immaterial under ER 401 and ER 402. Furthermore, the photos are more prejudicial than probative under ER 403.

_____ Granted _____ Denied _____ Reserved

d. The defense moves in limine to prohibit the State from introducing as evidence at trial photographs taken by Clark County Sheriff's Deputy Detective Eric Swenson from the interior of V.C.'s home. V.C. has been identified as a "witness" on the State's witness list. The photographs taken by Detective Swenson do not represent the alleged conditions in place when the alleged incident at bar occurred; to-wit: lighting conditions and character of the blinds and curtain which were down according to a witness interview of V.C.. The photographs taken by Detective Swenson were done during day light hours with the curtains and blinds drawn open. Defense moves to exclude these photos as they are likely to be confusing to a jury. See ER 403.

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_____ Granted _____ Denied _____Reserved

e. Defense moves the court for copies of jury questionnaires and responses in advance of trial currently scheduled to being Monday, November 14, 2016. Defense motion is made pursuant to Article 1, Section 3 of the Washington State Constitution and the 14th Amendment United States Constitution. Mr. Crawford has Constitutional rights to a fair trial and due process of law.

_____ Granted _____ Denied _____ Reserved

Respectfully submitted this 2nd day of Nov., 2016.

Matthew R. Hoff, WSB# 31806
Attorney for Defendant

On this 2 day of Nov., 2016, I hand delivered directly to the attorneys of records for the plaintiff a copy of the document to which this affidavit is attached. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 2 day of Nov., 2016, in Vancouver, Clark County, Washington.

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APPENDIX D

NO. 47042-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

JOSE MIGUEL GASTEAZORO-PANIAGUA, Petitioner

CLARK COUNTY SUPERIOR COURT CAUSE NO. 10-1-00004-6

RESPONSE TO PERSONAL RESTRAINT PETITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

A. IDENTITY OF RESPONDENT AND AUTHORITY FOR RESTRAINT

The State of Washington is the Respondent in this matter. The defendant is restrained by the judgment and sentence entered by the Clark County Superior Court on August 11, 2010, under cause number 10-1-00004-6.

B. ISSUES FOR REVIEW

Whether the State failed to disclose exculpatory evidence?

Whether the State improperly vouched for a witness?

Whether Mr. Gasteazoro-Paniagua received the effective assistance of counsel?

C. STATEMENT OF THE CASE

On December 30, 2009, Jose Muro was working in the back room of the Bi-Lo market on Highway 99 in Clark County, Washington. RP 731. At approximately 10:00 p.m., a man walked into the store, headed directly to the back, and started shooting at Muro. RP 735. The first shot hit Muro in the shoulder. The second shot hit Muro in the stomach. The third shot hit Muro in the shoulder again and sent him falling to the

ground. When Muro was on the floor, he was shot in the head. The final shot went through Muro's hand. RP 735-36.

Muro was rushed to the hospital where he was in surgery until the following night. RP 1531. The shot to Muro's head went through his skull and out the back of his head. RP 838. Muro spent the next eight days in the hospital. RP 790. Muro's head was stapled shut. RP 837-38. He sustained a broken shoulder, a broken arm, and a broken finger. One of his knuckles was completely shot off. RP 741.

Clark County Sheriff's Office "CCSO" Detectives Rick Buckner and Detective Lindsey Schultz talked to Muro the night after the shooting, immediately after he came out of surgery. RP 1531. Muro was hooked up to a series of tubes and, according to Detective Buckner, was in "pretty bad shape." RP 1531. Muro told Detective Buckner and Detective Schultz that his best friend, "Neeka," was the person who shot him last night at Bi-Lo. RP 1537-38. Jose Gastiazoro-Paniagua, the defendant, was known to all of his friends and family as "Neeka." RP 704-05. Detective Buckner asked Muro if he was sure Neeka shot him. Muro said he was sure. RP 1537-38.

Trial commenced on June 14, 2010. RP 71. For the next two weeks, the State presented more than twenty witnesses who testified to the

defendant's motive, means, and opportunity to shoot Jose Muro, with the intent to kill him.

The State called a number Muro's friends and family members who also knew the defendant. Each witness testified that, approximately one week before the shooting, Muro and the defendant had a falling-out in their close friendship. RP 702,758-60, 781, 783. Muro had a brother named "Johnny." Johnny's girlfriend was named Nichole. Johnny and Nichole recently had a baby together. RP 758. The defendant was also close friends with Johnny. RP 756. Just before Christmas of 2009, Muro learned the defendant was having an affair with Nichole. RP 702, 783, 781, 758-60. Muro viewed this affair as a betrayal against him and his family. RP 760. Muro and the defendant had heated exchanges over the phone during the following week. RP 786. Muro and the defendant also testified to this set of facts. RP 722-725, 1840-41.

Jose Muro testified he and his brother had been good friends with the defendant for nearly ten years. RP 720, 726. Muro testified he found out about the defendant's affair with Nichole just before Christmas of 2009. RP 725. Muro was angry about the affair. He felt the defendant "did [his] brother wrong." RP 722. He exchanged words with the defendant. RP 725.

Muro testified, on the night of December 30, 2009, he received a phone message from the defendant and called him back. RP 730. The defendant's cell phone records confirmed he made this call to Muro. RP 1685, 1687. The defendant wanted to get a drink with Muro. Muro told him he could not get a drink because he was working. RP7 31-32. Muro testified that the defendant knew he worked at Bi-Lo and he would have known where he worked within the store in the back. RP 732.

The jury viewed surveillance video from Bi-Lo from the night of the shooting. RP 558; Ex. 22. Although the video was "grainy," it clearly depicted a man walk into the store immediately before the time of the shooting, walk-out, and then walk in again and head directly to the back of the store. The man had the general physique of the defendant and he was wearing a dark hooded sweatshirt with the hood up. RP 558, 594, 601.

Officers located a wallet and a cell phone on the defendant's person at the time of his arrest. The wallet contained an identification card for "Jose Roman Lopez," from Nevada. RP 1679-80; Ex. 17. The cell phone contained a photograph of the defendant holding a hand gun. RP 1176-77, 1198; Ex. 173. CCSO conducted a forensic examination of the cell phone pursuant to a search warrant and discovered the photo was taken two weeks before Muro was shot. RP 1165, 1176, 1189.

Frank Bulgar testified as a ballistics expert for the State. RP 1195. Bulgar testified the gun that the defendant was holding in the cell phone photograph was a Springfield Armory X-D bi-tone model handgun. RP 1198. Bulgar testified these hand guns utilize .40 caliber and .45 caliber bullets. RP 1201. Bulgar said he had no doubt that the gun the defendant was holding in the photograph was real. RP 1200.

CCSO Detective Kevin Schmidt testified he recovered eight .45 caliber bullet casings from around and under the cooler at Bi-Lo where Muro was shot. RP 474-75, 451; Ex. No. 48-55, 150-152. CCSO deputies took custody of the bullet fragments that were removed from Muro's body during surgery which were consistent with the recovered bullet casings. RP 296, 347; Ex. 46-48.

Dionisio Ibanez is the father of the defendant's girlfriend, Melissa Ibanez. RP 1058. Dionisio testified, just before New Year's of 2009, he saw the defendant loading a gun at his daughter's apartment in Vancouver, Washington. RP 1058, 1060, 1068. Dionisio recognized the gun as being a .45 caliber gun. RP 1069. The defendant told Dionisio he recently bought the gun. RP 1070.

The defendant testified that the night of the shooting December 30, 2009, he was having dinner at a Chinese restaurant in Portland, Oregon. RP 1850. He could not recall the name of the restaurant or the time he was

eating. RP 1850-51. He said he was planning to go to Reno, Nevada, that night but changed his mind and went to Wilsonville, Oregon, instead. RP 1850-53. The defendant said, five days later, he took his friend, "Smokey's" car to Yakima. RP 1861. He did not think Smokey would want his car back. RP 1862-63.

The defendant's good friend, Garold "Trent" Jacobson, also testified at trial. RP 1410. Jacobson had known the defendant for more than twelve years. RP 1410-11. Jacobson and the defendant were housed in the same cell block at the Clark County Jail while the defendant was pending trial. RP 1413. Jacobson said the defendant confided in him about shooting Muro and the events that led up to the shooting. RP 1424-1443.

Jacobson was pending trial on a separate case for acting as an accomplice to murder in the first degree and three counts robbery in the first degree. RP 1446. Jacobson entered into a cooperation agreement with the State to provide truthful testimony against the six co-defendants in his pending case. RP 1446-47. As part of the cooperation agreement, Jacobson also agreed to provide truthful testimony against the defendant in this case. RP 1446-47. In exchange, the State would agree to recommend a plea to three counts of robbery in the first degree with a deadly weapon enhancement on Jacobson's pending case and a 120 month sentence. RP 1448, 1475; Ex. 257 – Cooperation Agreement.

The State will provide additional facts pertaining to the issues the defendant raises in the argument section of this Response Brief.

D. ARGUMENTS WHY PETITION SHOULD BE DISMISSED

A personal restraint petition is not a substitute for a direct appeal. *In re Hagler*, 97 Wn.2d 818, 823-24, 650 P.2d 1103 (1982). A personal restraint petitioner must prove either a constitutional error that caused actual and substantial prejudice or a nonconstitutional error that caused a complete miscarriage of justice. *In re Coats*, 173 Wn.2d 123, 132, 267 P.3d 324 (2011); *In re Cook*, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). Moreover, because a personal restraint petition is not a second bite at a direct appeal, "new issues must meet a heightened showing before a court will grant relief." *In re Yates*, 177 Wn.2d 1, 17, 296 P.3d 872, 880 (2013); *Coats*, 173 Wn.2d at 132 (holding that relief "by way of a collateral challenge to a conviction is extraordinary, and the petitioner must meet a high standard before this court will disturb an otherwise settled judgment") (citation omitted). Moreover, the petitioner "must make these heightened showings by a preponderance of the evidence." *Yates*, 177 Wn.2d at 17.

In evaluating personal restraint petitions, the Court can: (1) dismiss the petition if the petitioner fails to make a prima facie showing of

constitutional or nonconstitutional error; (2) remand for a full hearing if the petitioner makes a prima facie showing but the merits of the contentions cannot be determined solely from the record; or (3) grant the personal restraint petition without further hearing if the petitioner has proven actual and substantial prejudice or a complete miscarriage of justice. *Cook*, 114 Wn.2d at 810-11; *In re Hews*, 99 Wn.2d 80, 88, 660 P.2d 263 (1983). A petitioner's bare assertions and self-serving statements are insufficient to justify a reference hearing, let alone to establish actual and substantial prejudice or a complete miscarriage of justice. *Yates*, 177 Wn.2d at 18; *See also In re Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992); *In re Reise*, 146 Wn.App 772, 780, 192 P.3d 949 (2008); RAP 16.7(a)(2)(i). Moreover, for "matters outside the existing record, the petitioner must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief; if the evidence is based on knowledge in the possession of others, the petitioner may either present their affidavits or present evidence to corroborate what the petitioner believes they will reveal if subpoenaed. *Yates*, 177 Wn.2d at 18 (internal quotations omitted). This corroboration "must be more than mere speculation or conjecture." *Id.* (citation omitted).

I. THE STATE DISCLOSED ALL EXCULPATORY EVIDENCE TO MR. GASTEAZORO-PANIAGUA

To establish a *Brady* violation a defendant must "demonstrate the existence of each of three necessary elements: "[(1)] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [(2)] that evidence must have been suppressed by the State, either willfully or inadvertently; and [(3)] prejudice must have ensued." *State v. Mullen*, 171 Wn.2d 881, 895, 259 P.3d 158 (2011) (alterations in original) (quoting *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999)). If a defendant fails to demonstrate any one element, his *Brady* claim fails. *Strickler*, 527 U.S. at 281-82.

Under the second element, where "a defendant has enough information to be able to ascertain the supposed *Brady* material on his own, there is no suppression by the government." *Mullen*, 171 Wn.2d at 896 (citation omitted), 902 (stating "there is no *Brady* violation when a defendant possessed the information that he claims was withheld or where he possesses the salient facts regarding the existence of the [evidence] that he claims [was] withheld") (alterations in original) (citation omitted). Furthermore, since "suppression by the Government is a necessary element of a Brady claim, if the means of obtaining the exculpatory

evidence has been provided to the defense, the *Brady* claim fails." *Id.* (citation omitted). Simply put, evidence that could have been discovered but for a lack of due diligence by the defense is not a *Brady* violation. *Id.* at 896, 902-03; *State v. Lord*, 161 Wn.2d 276, 293, 165 P.3d 1251 (2007); *In re Benn*, 134 Wn.2d 868, 916-18, 952 P.2d 116 (1998). Thus, when the State provides the defense pretrial opportunities to interview its witnesses about the matters at issue it "satisfie[s] any *Brady* obligations with respect to the contents of [those witnesses'] testimony." *Mullen*, 171 Wn.2d at 898-899.

The third element, whether prejudice ensued, requires the defendant to bear the burden of showing a reasonable probability that the result of the proceeding would have been different if the State had disclosed the evidence to the defense. *State v. Thomas*, 150 Wn.2d 821, 850, 83 P.3d 970 (2004). Moreover, in assessing whether prejudice ensued, reviewing courts must consider the admissibility of the alleged, undisclosed evidence. *Mullen*, 171 Wn.2d at 897, 893-94. This requirement makes sense because if the undisclosed evidence is "neither admissible nor likely to lead to admissible evidence it is unlikely that

disclosure of the evidence could affect the outcome of a proceeding." *State v. Knutson*, 121 Wn.2d 766, 773, 854 P.2d 617 (1993); *State v. Gregory*, 158 Wn.2d 759, 797-98, 147 P.3d 1201 (2006) *rev'd on other grounds State v. W.R., Jr.*, 181 Wn.2d 757, 336 P.3d 1134 (2014).

a. The State disclosed Mr. Jacobsen's criminal history to Mr. Gasteazoro-Paniagua as evidenced by the State's Motions in Limine, the State's supplemental briefing on Mr. Jacobsen's criminal history, a certified copy of his juvenile adjudication and disposition, and the report of proceedings.

Here, Mr. Gasteazoro-Paniagua, in his Statement of the Case under a heading titled "The State's Efforts to Hide the Truth About Jacobsen," asserts that the State "failed to disclose . . . [Mr. Jacobsen's] prior convictions." Br. of Pet. at 5, 7. The prior convictions that were undisclosed, according to Mr. Gasteazoro-Paniagua, were "prior felony convictions, which included Taking a Motor Vehicle, Bail Jumping, and a prior Second-Degree Assault." Br. of Pet. at 7. Mr. Gasteazoro-Paniagua claims this allegation is supported by trial counsel's declaration and by the report of proceedings wherein trial counsel sought to impeach Mr. Jacobsen, "but only with a juvenile conviction" and not the undisclosed felony convictions.[1] Br. of Pet. at 7.

[1] As explained below the juvenile conviction is for Taking a Motor Vehicle and is one of the felony convictions Mr. Gasteazoro-Paniagua claims was not disclosed to him at the trial level.

The declaration of trial counsel, Charles Buckley WSBA #9048, states:

> 7. I wanted to impeach Mr. Jacobsen with his prior crimes to show he was dishonest.
>
> 8. I was not informed that Mr. Jacobsen had been convicted of Taking a Motor Vehicle, Assault in the Second Degree, and Bail Jumping.

Dec. of Charles Buckley. Mr. Buckley signed his declaration, and above his signature he stated in all capital letters "I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT." *Id.* A cursory review of the relevant trial record and documents filed with the trial court, however, shows that those statements are false. Furthermore, matters outside of the trial record confirm the falsity of those portions of the declaration.

On or about June 1, 2010, the trial prosecutor, Kasey Vu, provided Mr. Buckley with a document titled "Criminal History of Garold Trent Jacobsen" that contained the names of all of Mr. Jacobsen's convictions, their case numbers, the dates of the offenses, and the sentencing dates. Appendix A – Declaration of Kasey T. Vu; Appendix A2.[2] That Mr. Buckley received this document is substantially bolstered by email

[2] This document was created for the purpose of providing it to defense counsel.

correspondence between Mr. Vu and Mr. Buckley in which, on June 1, 2010, Mr. Vu informs Mr. Buckley that "Jacobsen's criminal history and the search warrants and affidavit for the cell phone stuff will be available after 1:30 today." Appendix B. Similarly, on June 2, 2010, Mr. Buckley emails Mr. Vu to confirm that they "are meeting at 1:30 today to go over witnesses [sic] criminal history" and Mr. Vu responds that the proposal "is fine." Appendix B.

In addition, on June 11, 2010, the State filed its pre-trial motions in limine. CP 108-110, attached as Appendix C. This document was faxed to Mr. Buckley that same day. Appendix D. The State's fourth motion in limine was to:

> prohibit any mention that a witness, Garold Trent Jacobsen, has been convicted of any crimes. Jacobsen has misdemeanor convictions for driving with a suspended license, Bail Jumping, and Negligent Driving in the First Degree. He also has a felony adjudication for Taking a Motor Vehicle Without Permission as a juvenile in May 2000. Finally, he has a felony conviction for Assault in the Second Degree. With the exception of the Taking Mother [sic] Vehicle, none of these crimes is admissible for impeachment under ER 609. . . . With respect to the Taking Motor Vehicle adjudication, the crime was committed on November 4, 1999, and Jacobsen was sentenced on May 25, 2000. Jacobsen was a juvenile at the time. . . .

Appendix C at 2. On June 14, 2010, the trial court heard argument on the State's motions in limine, and, in particular, on the State's motion as it pertained to Mr. Jacobsen's criminal history. RP 124-28.

During that argument, Mr. Buckley specifically mentioned Mr. Jacobsen's Taking a Motor Vehicle conviction, that it occurred in 2000, and stated "I only have the . . . paperwork showing the conviction and it was in 2000 in May." RP 124-26. Though Mr. Vu would provide a certified copy of Mr. Jacobsen's adjudication and disposition to the trial court and Mr. Buckley to clear up whether 10 years had passed under ER 609, the court deferred its ruling on the admissibility of that conviction until a later date. RP 127-28, 177-78. Notably, when the trial court asked Mr. Buckley if he planned on using Mr. Jacobsen's other convictions, Mr. Buckley responded "No." RP 128.

On June 22, 2010, the State filed a supplemental memorandum regarding Mr. Jacobsen's Taking a Motor Vehicle conviction titled "State's Memorandum of Law Concerning the Admissibility of a Witness' [sic] Prior Juvenile Adjudications for Impeachment." CP 137-144, attached as Appendix E. That memorandum contained a copy of Mr. Jacobsen's disposition as well as the original information to which he pled. *Id.* That same day, the parties readdressed the admissibility of Mr. Jacobsen's conviction. RP 1258-1263. The trial court ultimately concluded the conviction was outside of 10 years and inadmissible, and asked "[d]oes anybody really think a juvenile conviction from ten years ago is going to

make a difference to the jury?" RP 1262-63. Mr. Buckley responded to the trial court's question with a simple "No." RP 1262.

Finally, just before Mr. Jacobsen testified, the trial court inquired with Mr. Buckley as to whether he had any additional information that he wanted the court to consider regarding the trial court's ruling on Mr. Jacobsen's Taking a Motor Vehicle conviction. RP 1408. Mr. Buckley responded by stating that he was not objecting to the court's ruling and agreed the conviction "was excluded under the rule [(ER 609)]." RP 1408-09.

As is evident, based on the above and the attached documentation, Mr. Buckley's declaration wherein he asserts the State failed to inform him of Mr. Jacobsen's criminal history is false and misleading. Mr. Buckley knew of Mr. Jacobsen's criminal history, was provided that history by the State, and did not attempt to impeach Mr. Jacobsen with any of his other past convictions. This latter fact is unsurprising as Mr. Jacobsen could not have been impeached to show he was dishonest by way of his prior convictions for misdemeanor Bail Jumping and Assault in the Second Degree, which both occurred in 2002.

Similarly unmistakable, is the fact that Mr. Gasteazoro-Paniagua's current counsel failed to adequately review the record and trial documents or fact-check Mr. Buckley's Declaration before accusing Mr. Vu of

making "Efforts to Hide the Truth About Jacobsen." Br. of Pet. at 5. Ultimately, Mr. Gasteazoro-Paniagua has failed to establish a *Brady* violation because the State provided Mr. Buckley with Mr. Jacobsen's criminal history.

b. The facts underlying Mr. Jacobsen's pending Murder and Robbery charges were (1) not exculpatory or impeaching; (2) not suppressed by the State; and (3) not material or admissible.

Here, under the same heading, "The State's Efforts to Hide the Truth About Jacobsen," Mr. Gasteazoro-Paniagua notes that the State did not disclose the police reports detailing Mr. Jacobsen's crimes to Mr. Buckley and that Mr. Buckley made no specific request for them. Br. of Pet. at 6. Mr. Gasteazoro-Paniagua summarizes those crimes and states that the jury "did not hear any of these facts." Br. of Pet. at 7. Further, Mr. Gasteazoro-Paniagua argues that "because the State did not disclose and defense counsel did not discover the underlying facts, Jacobsen was not confronted with the truth." Br. of Pet. at 8. Mr. Gasteazoro-Paniagua then claims that because of this the "jury was denied the ability to accurately assess Jacobsen's bias, interest and true motivation for testifying against" him. Br. of Pet. 8.

The specific facts of Mr. Jacobsen's crimes were not exculpatory or impeaching.

Nothing about the facts underlying the crimes for which Mr. Jacobsen was charged exculpated Mr. Gasteazoro-Paniagua or could be used to impeach Mr. Jacobsen, and Mr. Gasteazoro-Paniagua fails to identify the specific facts by which Mr. Jacobsen could have been impeached. Listing the facts of the crime and asserting, in general, those facts could somehow be used to evaluate Mr. Jacobsen's credibility or impeach him is insufficient. No refuge for Mr. Gasteazoro-Paniagua's claim can be found in Mr. Buckley's declaration, which is equally bereft of a suggestion as to what specific facts are actually impeaching. Mr. Buckley's declaration states: "5. If I had known the specific facts of Mr. Jacobsen's crime, I would have definitely impeached him with those facts." Dec. of Charles Buckley. The questions of what specific facts and how he "would have definitely impeached him" remain unaddressed and unanswered by Mr. Gasteazoro-Paniagua and Mr. Buckley.

Moreover, the cases cited by Mr. Gasteazoro-Paniagua are inapposite as *Grant v. Lockett*, 709 F.3d 224 (3rd Cir. 2013) dealt with the impeachment of an informant through his prior convictions and parole status and *Davis v. Alaska*, 415 U.S. 308 (1974) involved the probationary status of a prosecution witness. Importantly, neither stands for the

proposition that the underlying facts of prior convictions or underlying facts as to how one become a parolee or probationer is the type of evidence that is admissible as impeaching or must be disclosed, nor did either find a *Brady* violation. As a result, neither supports Mr. Gasteazoro-Paniagua's claim that the specific facts of Mr. Jacobsen's underlying, pending crimes are necessarily exculpatory or impeaching and his *Brady* claim must fail.

The State did not suppress any evidence.

As noted above, since "suppression by the Government is a necessary element of a *Brady* claim, if the means of obtaining the exculpatory evidence has been provided to the defense, the *Brady* claim fails." *Mullen*, 171 Wn.2d at 896, 902 (citation omitted). Simply put, evidence that could have been discovered but for a lack of due diligence by the defense is not a *Brady* violation. *Id.* at 896, 902-03; *Lord*, 161 Wn.2d at 293. Moreover, when the State provides the defense pretrial opportunities to interview its witnesses about the matters at issue it "satisfie[s] any *Brady* obligations with respect to the contents of [those witnesses'] testimony." *Mullen*, 171 Wn.2d at 898-899.

Here, Mr. Vu informed Mr. Buckley that a written cooperation agreement was reached with Mr. Jacobsen on May 28, 2010, and Mr. Vu provided a copy of that cooperation agreement to Mr. Buckley on or about

June 1, 2010. Appendix A; Appendix B. That agreement indicated that Mr. Jacobsen was currently charged with the crime of Murder in the First Degree and three counts of Robbery in the First Degree, each with a firearm enhancement. CP 138-149 – attached as Appendix G; Appendix A. Mr. Buckley was also aware that, as charged, Mr. Jacobsen was facing between 610 to 733 months in prison. Appendix A; Appendix G. Mr. Buckley knew that pursuant to the cooperation agreement, Mr. Jacobsen would be pleading to three counts of Robbery in the First Degree with one Deadly Weapon Enhancement, and stipulating to a sentence of 126 months in prison. Appendix A; Appendix G.

Moreover, Mr. Vu was working on setting up an interview for Mr. Buckley with Mr. Jacobsen as early as June 1, 2010. Appendix A; Appendix B. That interview took place on June 3, 2010, and was attended by Mr. Buckley and his investigator. Appendix A; Appendix B. The interview lasted well over an hour, was audio-recorded, from which a transcript was later created, and both Mr. Buckley and his investigator questioned Mr. Jacobsen about his motive for cooperating with the State and the benefits he was receiving in exchange for his cooperation. Appendix A. Mr. Buckley declares that he "did not conduct an independent investigation into the facts of Mr. Jacobsen's crimes" and that this "was complicated by the position taken by Mr. Jacobsen's attorney

when I tried to ask questions about his case during our defense interview." Dec. of Charles Buckley. Mr. Buckley, however, once again fails to provide any evidence to support the claim "that he [(Mr. Buckley)] tried to ask questions about his case during our defense interview" and that Mr. Jacobsen's counsel in some way "complicated" this endeavor despite the fact that the interview was recorded and transcribed. Appendix A. And once again there is a startling lack of specificity in the declaration regarding what endeavors were made in the interview to learn of the specific facts of Mr. Jacobsen's case considering the allegation that the State was making efforts to hide the "truth" about Mr. Jacobsen.

Furthermore, the crimes with which Mr. Jacobsen was charged were the subject of significant local news coverage. In the three months prior to Mr. Gasteazoro-Paniagua's trial, the local newspaper printed no less than eight articles about the crimes, many of which contained specific facts about the crimes, two of which were specifically about Mr. Jacobsen, and one of which was about his specific role in the crimes. Appendix F – Articles from "The Columbian." In sum, the State (1) provided the means of obtaining the allegedly, exculpatory evidence to the defense; and (2) provided the defense the pretrial opportunity to interview Mr. Jacobsen about the matters at issue. Thus, when combined with the fact that the specific facts surrounding Mr. Jacobsen's crimes were well-publicized, it

was only Mr. Buckley's lack of due diligence that prevented his discovery of the alleged impeaching evidence if he, in fact, did not know about the facts about which he now complains he was ignorant.[3] Accordingly, Mr. Buckley's lack of due diligence defeats Mr. Gasteazoro-Paniagua's *Brady* claim. *Mullen*, 171 Wn.2d at 896, 902-03; *Lord*, 161 Wn.2d at 293.

No prejudice ensued.

Mr. Gasteazoro-Paniagua bears the burden of establishing prejudice by showing a reasonable probability that the result of the proceeding would have been different if the State had disclosed the evidence to the defense. In order to do this, he must demonstrate the evidence was itself admissible or would lead to admissible evidence. But, as argued above, neither Mr. Gasteazoro nor Mr. Buckley provide any real theory of admissibility. Rather, there is just mere assertion that "the jury was denied the ability to accurately assess Jacobsen's bias, interest, and true motivation for testifying . . ." and that "I [(Mr. Buckley)] would have definitely impeached him with those facts." Br. of Pet. at 8; Dec. of

[3] In "Defense's Response to State's Response to Defendant's Motion for New Trial," which was filed on July 14, 2010, Mr. Buckley expounds upon the information he had, prior to trial, about Mr. Jacobsen's involvement in the crimes for which he was charged, and claims that new information that came to light is "contrary to the information that he [(Mr. Jacobsen)] gave at his initial interview with [the defense investigator] with regard to his participation in the homicide." CP 167-171 – Attached as Appendix H; *See also* RP 2061-63. How this new information could contradict the old information about which Mr. Buckley now declares he was unaware of is bewildering.

Charles Buckley. Mr. Jacobsen's bias, interest, and/or motivation for testifying are pretty straightforward: he was charged with extremely serious crimes and was looking at between 610 to 733 months in prison and by agreeing to testify against his co-defendants and Mr. Gasteazoro-Paniagua he was looking at serving only 126 months. Nothing about his specific role in the crimes for which he was charged or the specific facts of those crimes illuminates or impeaches, and Mr. Gasteazoro-Paniagua fails to advance a convincing argument otherwise. That evidence was inadmissible and had it been disclosed, even assuming it was not, there is not a reasonable possibility that the proceeding would have been different. Thus, his *Brady* violation claim fails on this element as well.

II. THE STATE DID NOT IMPROPERLY VOUCH FOR MR. JACOBSEN.

"Improper vouching generally occurs (1) if the prosecutor expresses his or her personal belief as to the veracity of the witness or (2) if the prosecutor indicates that evidence not presented at trial supports the witness's testimony." *State v. Ish*, 170 Wn.2d 190, 196, 241 P.3d 389 (2010) (citation omitted). Vouching is improper because "[w]hether a witness has testified truthfully is entirely for the jury to determine." *Id.* Consequently, evidence that a "witness has agreed to testify truthfully . . .

should not be admitted as part of the State's case in chief." *Id.* at 198. Thus, the prosecutor in *Ish* improperly vouched for the cooperating witness when he asked him: "[w]ith regard to exchanging testimony in this case, what type of testimony?" and the informant answered "[t]ruthful testimony." *Id.* at 194.

That said, "where 'there is little doubt' that the defendant will attack the veracity of a State's witness during cross-examination, for example, the State is entitled to engage in preemptive questioning of its witness on direct to 'take the sting' out of the inevitable damaging cross-examination." *State v. Smith*, 162 Wn.App. 833, 850, 262 P.3d 72 (2011) (quoting *Ish*, 170 Wn.2d at 199 n. 10). Nonetheless, "[if] the agreement contains provisions requiring the witness to give truthful testimony, the State is entitled to point out this fact on redirect if the defendant has previously attacked the witness's credibility." *Ish*, 170 Wn.2d at 199.

Here, prior to Mr. Jacobsen's testimony, the parties discussed the vouching issue. RP 1353-56. In seeking to clarify the court's ruling, Mr. Vu stated the following: "So just – just so I'm clear, when Mr. Jacobsen testifies, after he is impeached by the Defense, which I have no doubt he – he will be, the State can ask him about the agreement . . ." and "For example, after he has been impeached by Mr. Buckley, on redirect I'm going to ask him, okay, what his agreement is with the State in terms of

testifying in this case. . . ." RP 1354-55. Ultimately, the trial court ruled that the State could not elicit that the agreement required Mr. Jacobsen to testify truthfully, but it could ask him whether "he's testifying truthfully or not." RP 1353-56.

During Mr. Vu's direct examination of Mr. Jacobsen, the following exchange took place:

> Q: Now, you said that – that you're – obviously you're in trouble.
>
> A: Yes.
>
> Q: Okay. What kind of trouble?
>
> A: I'm facing an accomplice to first degree murder and three counts of rob one.
>
> Q: Okay. And in return for your testimony, if you will, in this case, what are you expecting?
>
> A: I have a – a plea agreement with the State.

RP 1446. In further discussing the plea or cooperation agreement the following exchange took place:

> Q: Okay. What other matters are you assisting the State on?
>
> A: My case.
>
> Q: Your case?
>
> A: Yes.
>
> Q: In – in relation to what?

A: I have, I believe, five or six other co-defendants.

Q: Okay. And your agreement is to do what?

A: To tell the truth there as well.

Q: Against your co-defendants?

A: Yes

Q: And what are you getting in return for your cooperation?

A: A lowered sentence

RP 1447.

Mr. Vu did not improperly vouch for Mr. Jacobsen because he did not ask Mr. Jacobsen on direct examination if part of the agreement was to testify truthfully nor did he ask a question like the prosecutor in *Ish* who asked, "with regard to exchanging testimony in this case, what type of testimony." *Ish,* 170 Wn.2d at 198; *See also Smith*, 162 Wn.App. at 77 (reproducing portions of State's direct examination, which included questions such as: "[a]nd was it, basically, your understanding that you had an ongoing duty to provide truthful information in connection with this case?"). Mr. Vu simply asked Mr. Jacobsen what his agreement was with respect to his pending case and did not highlight Mr. Jacobsen's answer. RP 1447.

Moreover, just as Mr. Vu predicted, Mr. Buckley began his cross examination of Mr. Jacobsen by attacking his credibility and did so by

highlighting Mr. Jacobsen's pending charges and the fact that he was looking at more than 60 years in prison. RP 1448-49. Consequently, even if Mr. Vu's question of Mr. Jacobsen constituted vouching, it was the type "of preemptive questioning of its witness on direct to 'take the sting' out of the inevitable damaging cross-examination" approved of in *Smith*, 162 Wn.App. at 850 (quoting *Ish*, 170 Wn.2d at 199 n. 10). Moreover, Mr. Vu's questioning of Mr. Jacobsen on redirect examination regarding the requirement that he testify truthfully was explicitly described as proper by *Ish*, 170 Wn.2d at 199.

Assuming arguendo that Mr. Vu's question ran afoul of *Ish*'s prescriptions regarding vouching, any error was harmless. Mr. Gasteazoro-Paniagua bears the burden of showing there is a substantial likelihood the error affected the jury's verdict and he cannot. Mr. Jacobsen's credibility was not built upon a single question and answer during his direct examination, but upon his knowledge of information that would have only been available to him if Mr. Gasteazoro-Paniagua had actually confessed to him and because the information he provided was corroborated by the police investigation into the shooting. Plus, Mr. Gasteazoro-Paniagua had the motive, means, and opportunity to commit the crime. When combined with the video, Mr. Gasteazoro-Paniagua's flight, and lack of credibility, Mr. Jacobsen's credibility was bolstered far

more by the evidence than Mr. Vu's singular question on direct examination that elicited Mr. Jacobsen's agreement to testify truthfully. There is no reasonable possibility that any vouching affected the jury's verdict.

III. INEFFECTIVE ASSISTANCE

A defendant has the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). That said, a defendant is not guaranteed successful assistance of counsel. *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978). The defendant must make two showings in order to demonstrate ineffective assistance: (1) that counsel's performance was deficient and (2) that counsel's ineffective representation resulted in prejudice. *Strickland*, 466 U.S. at 687. A court reviews the entire record when considering an allegation of ineffective assistance. *State v. Thomas*, 71 Wn.2d 470, 471, 429 P.2d 231 (1967). Moreover, a "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011) (quoting *Strickland*, 466 U.S. at 689).

a. Deficient Performance

The analysis of whether a defendant's counsel's performance was deficient starts from the "strong presumption that counsel's performance was reasonable." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); *State v. Hassan*, 151 Wn.App. 209, 217, 211 P.3d 441 (2009) ("Judicial scrutiny of counsel's performance must be highly deferential.") (quotation and citation omitted). Thus, "given the deference afforded to decisions of defense counsel in the course of representation" the "threshold for the deficient performance prong is high." *Grier*, 171 Wn.2d at 33. This threshold is especially high when assessing a counsel's trial performance because "[w]hen counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient." *Id.* (quoting *Kyllo*, 166 Wn.2d at 863); *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) ("[T]his court will not find ineffective assistance of counsel if the actions of counsel complained of go to the theory of the case or to trial tactics." (internal quotation omitted)). On the other hand, a defendant "can rebut the presumption of reasonable performance by demonstrating that 'there is no conceivable legitimate tactic explaining counsel's'" decision. *Id.* (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

Cross-examination is an area of trial strategy or trial tactics that reviewing courts are loath to second guess because "[t]he extent of cross-examination is something a lawyer must decide quickly and in the heat of the conflict." *In re Davis*, 152 Wn.2d 647, 720, 101 P.3d 1 (2004) (quoting *State v. Stockman*, 70 Wn.2d 941, 945, 425 P.2d 898 (1967)). Unsurprisingly then, our Supreme Court has held that "even a lame cross-examination will seldom, if ever, amount to a Sixth Amendment violation." *In re Pirtle*, 136 Wn.2d 467, 489, 965 P.2d 593 (1998) (citation omitted). Thus, courts generally "entrust cross-examination techniques . . . to the professional discretion of counsel." *Davis*, 152 Wn.2d at 720.

Here, Mr. Gasteazoro-Paniagua argues that Mr. Buckley was ineffective because he engaged in a deficient cross-examination of Mr. Jacobsen, failed to discover the specific facts underlying the crimes for which Mr. Jacobsen was charged, for agreeing not to call Mr. Jacobsen a "liar" in closing argument, and for not objecting to the "vouching" during Mr. Jacobsen's direct examination. *See generally* Br. of Pet. Each of these arguments fails.[4]

Cross-examination.

With regard to Mr. Buckley's cross-examination of Mr. Jacobsen, it cannot be considered constitutionally deficient just because there were a

[4] It should be noted, that the trial court made sure to tell Mr. Buckley that it thought that he "did an excellent job in defending [his] client, I'll say that." RP 2072.

couple answers that in retrospect can be considered harmful. Mr. Gasteazoro-Paniagua claims that Mr. Buckley's questioning of Mr. Jacobsen allowed Mr. Jacobsen to characterize him (Mr. Gasteazoro-Paniagua) as a violent, dangerous man. Even assuming that the jury did not already have that impression of Mr. Gasteazoro-Paniagua, the elicitation of this information can still be fairly characterized as a reasonable trial tactic as it provides an alternative basis by which to suggest Mr. Jacobsen is being untruthful: having already been identified as a "snitch" Mr. Jacobsen must do whatever it takes, including lie, to make sure that the person against whom he was provided incriminating information stays in jail. In other words, that Mr. Jacobsen was testifying, in part, because he feared Mr. Gasteazoro-Paniagua does not redound to the benefit of his credibility.

Investigation into Mr. Jacobsen's crimes and failure to object to the alleged vouching.

These arguments have essentially been addressed above. Regardless of what investigation Mr. Buckley actually undertook into Mr. Jacobsen's pending crimes, the specific facts of those crimes were not going to be admissible. Thus, if Mr. Buckley chose not to investigate these facts, his decision was not deficient.

With regard to vouching, because Mr. Buckley had already addressed the vouching issue with the trial court prior to Mr. Jacobsen's testimony, he had preserved that objection for appeal. Most importantly, however, because vouching did not occur, he did not have a basis to object. Nonetheless, he may have chosen not to highlight the information in front of the jury if he considered it damaging. Moreover, it does not look particularly good for an attorney to object to a witness explaining he is telling the truth. Mr. Buckley's decision not object was correct legally and strategically and cannot constitute deficient performance.

The decision not call Mr. Jacobsen a "liar" in closing argument.

Mr. Gasteazoro-Paniagua describes this decision as an "[i]nexplicable [a]greement to a [l]imitation on [c]losing" and claims that it constituted an unreasonable limitation on Mr. Buckley's ability to attack Mr. Jacobsen's credibility in closing. Br. of Pet. 7, 15-16. While Mr. Buckley may have chosen to not directly call Mr. Jacobsen a "liar," he aggressively attacked his credibility during closing argument and said that he ratted on his friend and would "do whatever it takes to get outta here [(jail)]." RP 1983-86. His performance cannot be considered deficient because he chose to attack Mr. Jacobsen's credibility without calling him a "liar."

b. Prejudice

In order to prove that deficient performance prejudiced the defense, the defendant must show that "counsel's errors were so serious at to deprive [him] of a fair trial. . . ." *State v. Greer*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (quoting *Strickland*, 466 U.S. at 687). In other words, "the defendant must establish that 'there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different.'" *Id.* at 34 (quoting *Kyllo*, 166 Wn.2d at 862). "In assessing prejudice, 'a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to the law' and must 'exclude the possibility of arbitrariness, whimsy, caprice, nullification and the like.'" *Id.* (quoting *Strickland*, 466 U.S. at 694–95). Moreover, when juries return guilty verdicts reviewing courts "must presume" that those juries actually found the defendants "guilty beyond a reasonable doubt" of those charges. *Id.* at 41.

Assuming Mr. Buckley was deficient in the ways Mr. Gasteazoro-Paniagua alleges, he still cannot show those errors were so serious as to deprive him of a fair trial. The trial transcript is over 2,000 pages long, there were multitudes of witnesses, hundreds of exhibits, and handfuls of motions; there is no reasonable probability that what Mr. Gasteazoro-

Paniagua now characterizes as deficient performance could have changed the outcome of the proceedings

E. CONCLUSION

Based on the above arguments the defendant's personal restraint petition should be dismissed.

DATED this 10th day of July, 2015.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By: _____
Aaron T. Bartlett, WSBA #39710
Deputy Prosecuting Attorney

APPENDIX – A

STATE OF WASHINGTON)

: ss

COUNTY OF CLARK)

I, Kasey T. Vu, am over 18 years of age, and am competent to make this declaration.

1. I was the Deputy Prosecuting Attorney assigned to handle the case of State of Washington v. Jose Miguel Gastearozo-Paniagua, Clark County Superior Court case number 10-1-0004-6, where Jose Gastearozo-Paniagua was charged with Attempted Murder in the First Degree with a firearm enhancement, and Unlawful Possession of a Firearm in the First Degree.

2. I was the trial attorney for the State, and handled all pretrial matters, trial, and sentencing in this case.

3. Attorney Charles Buckley was the defense attorney assigned to represent Jose Gastearozo-Paniagua, and handled all pretrial matters, trial, and sentencing in this case.

4. While the case was pending, counsel for Garold Trent Jacobsen approached me and proposed a cooperation agreement, where Mr. Jacobsen would provide testimony against the other co-defendants in his own case, as well as against Mr. Gastearozo-Paniagua. Mr. Jacobsen was charged as an accomplice with five other co-defendants with Murder in the First Degree and 3 counts of Robbery in the First Degree.

5. The cooperation agreement with Mr. Jacobsen was finalized and signed on May 28, 2010. A copy of the cooperation agreement was provided to Mr. Buckley on or about June 1, 2010.

6. I also prepared a document titled "Criminal History of Garold Trent Jacobsen", listing all of the criminal convictions for Mr. Jacobsen known to the Prosecutor's Office at the time (as listed above). The document lists the crimes, county/state/cause numbers, dates of crime, and dates of sentencing. My review of my case file and correspondence with Mr. Buckley indicates I provided this document to Mr. Buckley on or about June 1, 2010.

7. At the request of the defense, I arranged for Mr. Buckley and his investigator, Steve Teply, to conduct an interview with Mr. Jacobsen. The defense interview took place on June 3, 2010 at the Cowlitz County Jail, where Mr. Jacobsen was housed. In

attendance were myself, Mr. Buckley, Mr. Teply, Mr. Jacobsen, and counsel for Mr. Jacobsen. The interview was audio-recoded, and a transcript was later created.

8. The defense interview of Mr. Jacobsen lasted well over an hour, during which both Mr. Buckley and Mr. Teply questioned Mr. Jacobsen about the information he claimed Mr. Gastearozo-Paniagua told him, the circumstances surrounding how he obtained this information, his motive for cooperating with the State, and the benefits he was receiving in exchange for his cooperation.

9. On June 11, 2010, I filed the State's Pretrial Motions in Limine with the trial court, and also had my assistant fax it to Mr. Buckley's office. We received confirmation that Mr. Buckley's office received the State's Pretrial Motions in Limine.

10. The State's Pretrial Motions in Limine contained seven points or issues that required the trial court to rule on. Point number four (4) dealt with the admissibility of Mr. Jacobsen's criminal convictions for impeachment purposes, including misdemeanors driving with a suspended license, Bail Jumping, Negligent Driving in the First Degree, and a juvenile felony adjudication for Taking Motor Vehicle Without Permission from May 2000, and an adult felony conviction for Assault in the Second Degree.

11. The trial court conducted pretrial motions, including a Criminal Rule (CrR 3.5) Hearing, and Motions in Limine the morning of June 14, 2010. Trial began on the afternoon of June 14, 2010.

12. During the pretrial hearing to deal with Motions in Limine, Mr. Buckley acknowledged and agreed that other than the Taking Motor Vehicle conviction, none of Mr. Jacobsen's other convictions were admissible for impeachment.

13. The trial court initially reserved ruling on the admissibility of the Taking Motor Vehicle adjudication, pending clarification on the whether 10 years had passed since Mr. Jacobsen was released from confinement for that juvenile adjudication.

14. After I provided a court-certified copy of Mr. Jacobsen's adjudication paperwork for this crime on the afternoon of June 14, 2010, showing that more than 10 years had elapsed, the trial court ruled that Mr. Jacobsen's May 2000 adjudication for the crime of Taking Motor Vehicle Without Permission was inadmissible for impeachment. Mr. Buckley argued extensively that the four days of community service that Mr. Jacobsen received as part of his sentence equated to confinement, and hence 10 years had not elapsed.

15. On June 22, 2010, I filed and served a copy on Mr. Buckley the State's Memorandum of Law Concerning the Admissibility of a Witness' Prior Juvenile Adjudications for Impeachment, addressing the inadmissibility of Mr. Jacobsen's juvenile Taking Motor Vehicle adjudication. The memorandum was written by John Fairgrieve, a fellow Deputy Prosecutor from my office.

16. Later that day, just prior to the testimony of Mr. Jacobsen, the trial court reiterated the court's ruling that Mr. Jacobsen's juvenile adjudication for Taking Motor Vehicle was excluded. Mr. Buckley agreed with the court that it was excluded.

CERTIFICATION: I declare and certify under penalty of perjury under the laws of the State of Washington that the preceding is true and correct to the best of my knowledge.

Executed at Vancouver, Washington, this 8th day of July, 2015.

Kasey T. Vu, WSBA #31528

Senior Deputy Prosecuting Attorney

APPENDIX – A2

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON, Plaintiff, v. JOSE MIGUEL GASTEAZORO-PANIAGUA, Defendant.	No. 10-1-00004-6 CRIMINAL HISTORY OF GAROLD TRENT JACOBSEN

To the best of the knowledge of the Prosecuting Attorney's Office, Garold Trent Jacobsen has the following prior criminal convictions:

CRIME	COUNTY/STATE CAUSE NO.	DATE OF CRIME	DATE OF SENTENCE
TAKING MOTOR VEHICLE WITHOUT PERMISSION	CLARK/WA 00-8-00598-4	11/4/1999	5/25/2000
DRIVING WHILE SUSPENDED 3	CLARK/WA 36642	3/29/2002	5/29/2002
DRIVING WHILE SUSPENDED 3	CLARK/WA 48298A	8/13/2002	10/30/2002
BAIL JUMPING	CLARK/WA 11203	9/11/2002	10/30/2002
ASSAULT 2	CLARK/WA 02-1-00957-3	4/2/2002	3/31/2003
NEGLIGENT DRIVING 1	CLARK/WA 6941	9/5/2004	10/26/2004

DATED this _____ day of June 2010.

Kasey T Vu, WSBA#31528
Deputy Prosecuting Attorney

CLARK COUNTY PROSECUTING ATTORNEY
1013 FRANKLIN STREET • PO BOX 5000
VANCOUVER, WASHINGTON 98666-5000
(360) 397-2261 (OFFICE)
(360) 397-2230 (FAX)

APPENDIX – B

Vu, Kasey

From: Vu, Kasey
Sent: Tuesday, June 01, 2010 1:02 PM
To: 'Chuck Buckley'
Subject: RE: Nica trial

Mr. Buckley,
I apologize, I was in court this morning.
Detective Smith's report was available for pick on Friday. Mr. Bulgar did not write a report on the gun. You also should have the audio recording, cooperation agreement with Jacobsen, and State's MTC as of this email. Jacobsen's criminal history and the search warrants and affidavit for the cell phone stuff will be available after 1:30 today. You should already have the data from the cell phone companies (previously provided); this additional paperwork is simply supporting documentation for that data.
We can attempt to schedule an interview with Jacobsen after court tomorrow morning. Can you please clarify what "jail records" on Jacobsen you are referring to?
Thanks.

Kasey

From: Chuck Buckley [mailto:cbuckley@cbuckleylaw.com]
Sent: Monday, May 31, 2010 2:14 PM
To: Vu, Kasey
Subject: RE: Nica trial

Mr. Vu
I would like to have the audio tape and the paperwork first thing tuesday morning. Given the late notice it is apparent that I will need to interview this witness before trial. Perhaps we can do it on Wednesday morning after the court rules on your motion for continuance. Also I will be asking the court to have jail records on Mr. Jacobsen since he has been in jail.

I have also been informed that we do not have any report from Mr. Smith which you indicated would be ready on Wednesday of last week. Is there a report? Also it is my underestanding that your so-call expert on the firearm did not prepare a report. If I am mistaken I have not recieved any report.

Finally, my client is not interested in a continuing the trial date. I would like to have any brief on your motion for a continuance provided to my office on Tuesday also. That will give me some opportunity to respond.
C. Buckley

From: Vu, Kasey [mailto:Kasey.Vu@clark.wa.gov]
Sent: Friday, May 28, 2010 6:15 PM
To: Chuck Buckley
Subject: Nica trial

Mr Buckley,
I am sure you are aware by now that the case was called ready yesterday afternoon, and that the issue regarding a continuance will be brought in front of Judge Johnson on Wed 6/2 at 9 am. At that time, my understanding is that Judge Johnson will hear arguments and either grant a continuance, or we proceed to trial.

Since yesterday afternoon, the State has discovered a new witness who we did not know existed, and had not been available to either side. His name is Garold Trent Jacobsen, a family friend of your client and an inmate who shared the same pod as your client in our jail. Mr. Jacobsen has provided information to the State that incriminates your client in this case, ie your client admitted to him about going to Bi-Lo and shooting the victim. He provided details. The State will provide a copy of the audio recording, the written agreement Mr Jacobsen has with the State, and his criminal history Tue morning (after the Holiday weekend). Obviously, the State intends on calling Mr Jacobsen as a witness at trial.

Congratulations on the new addition to your family! Enjoy the sunshine where you are; it's still raining here.

Have a good weekend.

Kasey

Vu, Kasey

From: Vu, Kasey
Sent: Wednesday, June 02, 2010 12:04 PM
To: 'Chuck Buckley'
Subject: RE: schedule

Mr Buckley,
Can we bump the interview with Det Smith to 3 pm tomorrow? He has another commitment elsewhere, and wants to make sure he has enough travel time to make our appointment. Everything else is fine. Thanks.

Kasey

From: Chuck Buckley [mailto:cbuckley@cbuckleylaw.com]
Sent: Wednesday, June 02, 2010 11:02 AM
To: Vu, Kasey
Subject: schedule

Mr. Vu
I am sending this to confirm that we are meeting at 1:30 today to go over witnesses criminal history. Tomorrow we are going to Cowlitz county to interview Jacobsen at 9:30. Also we are to interview Det. Smith at 1:30 tomorrow.
If this is not your understanding let me know.
C. Buckley

APPENDIX – C

3

FILED

2010 JUN 11 PM 3:38

Sherry W. Parker, Clerk
Clark County

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON, Plaintiff, v. JOSE MIGUEL GASTEAZORO-PANIAGUA, Defendant.	No.10-1-00004-6 STATE'S MOTION TO ADMIT DEFENDANT'S POST-ARREST STATEMENTS TO THE POLICE PURSUANT TO CrR 3.5 And STATE'S PRE-TRIAL MOTIONS IN LIMINE

COMES NOW the State of Washington, represented by its Deputy Prosecuting Attorney, Kasey T. Vu, makes the following Motion to Admit Defendant's Post-Arrest Statements to the Police Pursuant to CrR 3.5, and pre-trial Motions in Limine:

1. To admit statements made by the Defendant to the police after his arrest. CrR 3.5. Specifically, the State seeks to admit certain statements that the Defendant made to CCSO Detectives Lindsay Schultz and Rick Buckner after his arrest in Yakima. Prior to asking the Defendant any questions about his involvement in the case, the detectives advised the Defendant of his Constitutional Rights pursuant to Miranda. The Defendant acknowledged his rights, and agreed to speak with the detectives. The Defendant did not appear confused nor displayed any confusion about his rights. The detectives made no threats or promises to induce the Defendant to speak with them. In fact, the Defendant even agreed for the interview to be

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108

audio-recorded. The totality of the circumstances surrounding the post-arrest statements that the Defendant made to Detectives Schultz and Buckner show by a preponderance that the Defendant made these statements voluntarily, not under coercion, and are admissible.

2. To allow the State to impeach the defendant with certain of his prior convictions if he chooses to testify, and his testimony contradicts his prior criminal convictions, or if he elicits testimony of his exculpatory hearsay statements to other witnesses through either direct or cross examination. ER 806.

3. To prohibit the Defense from referring to any prior arrests, convictions, other criminal history of the victim, Jose Muro, or any alleged street gang affiliation or activities, or opinion on Muro's reputation. There is no evidence that Jose Muro was associated with any street gangs, or that the incidents in this case related to any gang activities. Such information is not relevant under ERs 401 and 402, and even if so its probative value is substantially outweighed by the danger of unfair prejudice under ER 403.

4. To prohibit any mention that a witness, Garold Trent Jacobsen, has been convicted of any crimes. Jacobsen has misdemeanor convictions for driving with a suspended license, Bail Jumping, and Negligent Driving in the First Degree. He also has a felony adjudication for Taking Motor Vehicle Without Permission as a juvenile in May 2000. Finally, he has a felony conviction for Assault in the Second Degree. With the exception of the Taking Mother Vehicle, none of these crimes is admissible for impeachment under ER 609. Further, any relevance of this evidence is outweighed by the danger of unfair prejudice. ER 401, 402, 403. With respect to the Taking Motor Vehicle adjudication, the crime was committed on November 4, 1999 and Jacobsen was sentenced on May 25, 2000. Jacobsen was a juvenile at the time, and this adjudication is not admissible for impeachment, unless the court makes a finding that it is necessary for a fair determination of guilt or innocence. ER 609(d). In addition, more than ten

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years has passed since this adjudication, and consequently the crime is no longer admissible for impeachment under ER 609(b).

5. To prohibit the Defense from referring to or inquiring about any prior arrest, criminal convictions, or criminal history of any witnesses unless the witness's prior criminal conviction(s) fall under a recognized exception in the Rules of Evidence. ERs 404(b), 608, 609.

6. To exclude any allegations of "prosecutorial misconduct" or "motions for dismissal" in the presence of the jury. Such allegations confuse the issues and mislead the jury. ERs 403 103(c).

7. To exclude witnesses. ER 615. However, the State reserves the right to have CCSO Detective Lindsay Schultz (the primary investigating officer in this case), remain at counsel table during trial.

If the Defendant intends to offer argument or evidence that the State has asked to be excluded or prohibited, the State requests that the court require the Defendant make an Offer of Proof outside of the presence of the jury.

DATED this 11th day of June, 2010.

ARTHUR D. CURTIS
Prosecuting Attorney

KASEY T. VU, WSBA #31528
Deputy Prosecuting Attorney

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APPENDIX – D

Transmission Report

Date/Time	06-11-2010	01:24:26 p.m.	Transmit Header Text	CLARK COUNTY DRUG UNIT
Local ID 1	360 397 2270		Local Name 1	CLARK COUNTY JUVENILE DIVISION
Local ID 2			Local Name 2	

This document : Confirmed
(reduced sample and details below)
Document size : 8.5"x11"

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JUN 1 1 2010

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON, Plaintiff, v. JOSE MIGUEL GASTEAZORO-PANIAGUA, Defendant.	No.10-1-00004-6 STATE'S MOTION TO ADMIT DEFENDANT'S POST-ARREST STATEMENTS TO THE POLICE PURSUANT TO CrR 3.5 And STATE'S PRE-TRIAL MOTIONS IN LIMINE

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Abbreviations:
HS: Host send
HR: Host receive
WS: Waiting send
PL: Polled local
PR: Polled remote
MS: Mailbox save
MP: Mailbox print
CP: Completed
FA: Fail
TU: Terminated by user
TS: Terminated by system
RP: Report
G3: Group 3
EC: Error Correct

APPENDIX – E

Orig

d

FILED
JUN 22 2010 8:48
Sherry W. Parker, Clerk, Clark Co.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON, Plaintiff, v. JOSE MIGUEL GASTEAZORO-PANIAGUA, Defendant.	No. 10-1-00004-6 STATE'S MEMORANDUM OF LAW CONCERNING THE ADMISSIBILITY OF A WITNESS' PRIOR JUVENILE ADJUDICATIONS FOR IMPEACHMENT

COMES NOW the State of Washington, represented by its deputy prosecuting attorney John Fairgrieve, to inform the court of the law applicable to the issue of the admissibility of a witness' juvenile adjudications for impeachment.

I. Facts Relevant to this Motion

Garold Trent Jacobson will be called as a witness for the prosecution. He is testifying pursuant to a cooperation agreement where, in return for truthful testimony in this trial and possibly others, the State has agreed to allow him to plead guilty to three counts of robbery in the first degree in a case unrelated to the instant matter and to recommend a sentence of 126 months in prison.

Jacobson was adjudicated on May 25, 2000 as a juvenile for the crime of taking a motor vehicle without the owner's permission, RCW 9A.56.070(1). He received five

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137

days of detention with credit for one day served. The remaining four days was converted to 32 hours of community service, to which 16 additional hours of community service were added, for a total of 48 hours of community service. *See* Exhibit 1.

II. Argument

ER 609, Impeachment by Evidence of Conviction of Crime, provides the following in pertinent part:

> Rule 609. Impeachment by evidence of conviction of crime
>
> (a) **General rule** For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime (1) was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered, or (2) involved dishonesty or false statement, regardless of the punishment.
>
> (b) **Time limit** Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.
>
> .....

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> (d) **Juvenile adjudications** Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a finding of guilt in a juvenile offense proceeding of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

Few cases have addressed the issue of the admissibility of a witness' prior juvenile adjudications for impeachment. However, the principal case in this area establishes the following guideline: In the absence of any indication of special reasons favoring admissibility of a witness' prior juvenile adjudications, the general rule is that the adjudications are inadmissible. *State v. Gerard*, 36 Wn. App. 7, 12, 671 P. 2d 286 (1983), review denied, 100 Wn. 2d 1035 (1984). In *Gerard* the defendant sought to impeach a juvenile witness with one or more of his prior juvenile adjudications. The trial court summarily denied the defendant's request, and after he was convicted the defendant appealed. In affirming Gerard's conviction the court of appeals noted that "[b]ecause ER 609(d) requires a positive showing that the prior juvenile record is necessary to determine guilt, a record of balancing is less important." The court went on to observe that: "Gerard did not give any reasons for admissibility beyond general impeachment of the witness' credibility. The evidence of a prior conviction would be of dubious value to a defendant in a bench trial. The burden was on Gerard to present reasons other than impeachment to demonstrate that the evidence was "necessary for a fair determination." The trial court did not abuse its discretion." *Gerard* at 12 *citing State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 20, 482 P.2d 775 (1971). *Accord, State v. Scherner*, 153 Wn. App. 621, 656, 225 P.3d 248, review granted, State v. Scherner,

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2010 Wash. LEXIS 480 (Wash., June 1, 2010)("Likewise, ER 609(d) provides that the trial court may admit a witness's juvenile adjudication only if it is necessary for a fair determination of the issue of guilt or innocence").

In the instant case the defendant's request to use Jacobson's prior juvenile adjudication for taking a motor vehicle without owner's permission (TMVWOP) for impeachment fails for two reasons. First, even though TMVWOP is a crime involving dishonesty (see *State v. Trepanier*, 71 Wn. App. 372, 858 p. 2d 511 (1993)) the conviction is more than ten years old, thus failing to meet the test under ER 609(b). Second, it is clear that the defendant's objective for offering the adjudication is simply to impeach the credibility of Jacobson. However, *Gerard, supra*, stands for the proposition that in the absence of any other reason beyond general impeachment, juvenile adjudications remain inadmissible. The defendant has failed to meet his burden of proving any other reason for admitting Jacobson's juvenile adjudication, and thus it remains inadmissible.

Dated this 21st day of June, 2010.

Arthur D. Curtis
Prosecuting Attorney

John P. Fairgrieve, WSBA #23107
Deputy Prosecuting Attorney

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
JUVENILE DIVISION IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON vs. Harold Trent Jackson III
DOB: 11-12-82

SCOMIS NO. 00-8-00598-4
JUVIS NO. 4748575 RMJ

ORDER OF DISPOSITION-COMMUNITY SUPERVISION

I. HEARING

THIS MATTER having come on for hearing this 25 day of May 2000, the youth being represented personally and by and through his/her attorney, and the State being represented by it's Deputy Prosecuting Attorney, the youth having previously

Entered valid plea(s) of guilty to [ ] been convicted at trial of

Count 1 R MV Charging Unlaw Use Veh w/o Perm Committed on or about November 9, 1999
Count ____ R ____ Charging ____ Committed on or about ____
Count ____ R ____ Charging ____ Committed on or about ____
Count ____ R ____ Charging ____ Committed on or about ____

II. FINDINGS

THE COURT having afforded each counsel the right to speak, having asked the above youth if he/she wished to make a statement on his/her behalf, having considered any mitigating and aggravating factors, and the case record to date, the Court finds that the youth is guilty of the above charge(s).

III. ORDER

NOW, THEREFORE, the Court orders the youth to consecutive terms of community supervision

6 months, Count I R 040 ____ months, Count ____ R ____
____ months, Count ____ R ____ ____ months, Count ____ R ____

✓ Juvenile Court jurisdiction is extended beyond the juvenile's eighteenth birthday

WHILE ON SUPERVISION, the youth shall abide by the following conditions and directives.

✓ A. LAW: The youth shall not violate any federal, state, or local laws of this or any other jurisdiction, nor shall he/she be in the company of any person known to him/her to be doing or having done so

✓ B. DETENTION SENTENCE: 5 days total (____ Ct I, ____ Ct II, ____ Ct III, ____ Ct IV)

1. Beginning ____, 19____
2. Credit for one days served.
3. Work credit 4 days are converted to 32 hours of community service/work crew
4. ____ Work/School release is authorized

FILED
MAY 25 2000
JeAnne McBride, Clerk, Clark Co.

✓ C. COMMUNITY SERVICE: 16 hours to be performed

1. Detention credit of ____ hours community service
2. TOTAL COMMUNITY SERVICE ORDERED UNDER DIRECTIVES B AND C ABOVE 48 HOURS

✓ D. TREATMENT: The youth shall attend and successfully complete a counseling, therapy, or information program as directed by his/her parent or probation counselor

✓ E. EDUCATION: The youth shall enroll in and attend an educational/vocational program, and comply with the mandatory school attendance provisions of 28 A 225 RCW Suspension or expulsion from such program may be deemed a violation of community supervision and your probation officer will notify the school of this requirement

✓ F. RESIDENCE: The youth shall live at a residence approved by his/her probation counselor, shall abide by all reasonable written rules of the residence and shall not move unless given prior permission to move by the court or his/her probation counselor, and shall spend every night at his Court approved residence unless given permission otherwise by his/her probation officer and/or parent

Exhibit 1

✓ G. FINANCIAL DIRECTIVE: The youth shall pay the following to the Clark County Clerk
___ 1 A $_____ fine is imposed
✓ 2 A $ 100.00 fee for the Crime Victim's Fund
✓ 3. Restitution in an amount to be determined by the Probation Counselor If the Probation Counselor and the respondent cannot agree on an amount, the matter may be set for hearing
___ 4 Restitution on all counts listed in the information filed

✓ H. ASSOCIATION: The youth shall not associate with any person on probation or parole, nor shall he/she voluntarily associate with or communicate with his/her co-respondent, or with _____

___ I. YOU ARE TO HAVE NO CONTACT WHATSOEVER WITH THE VICTIM(S)_____

VIOLATION OF THIS ORDER IS A CRIMINAL OFFENSE UNDER CHAPTER 10.99 RCW AND WILL SUBJECT A VIOLATOR TO ARREST. ANY ASSAULT OR RECKLESS ENDANGERMENT THAT IS A VIOLATION OF THIS ORDER IS A FELONY.

✓ J. While under community supervision, the youth shall be under the charge of a probation counselor of the Clark County Superior Court Juvenile Department and shall follow the conditions in this order and any other written rules as directed by the Probation counselor The youth shall fully and truthfully report to such probation counselor at such times and places as directed.

___ K. Supervision shall be transferred to. _____

___ L. ADDITIONAL CONDITIONS/DIRECTIVES:_____

___ M. COUNT(S) _____ is/are dismissed with/without prejudice.

DONE IN OPEN COURT and in the presence of the above-named youth this 25 day of May, 2000

APPROVED AS TO FORM:

Deputy Prosecuting Attorney 14820

Defense Attorney 12911

SUPERIOR COURT JUDGE/COMMISSIONER

I HAVE RECEIVED A COPY OF THIS ORDER. I UNDERSTAND IT AND HAVE NO FURTHER QUESTIONS TO ASK OF THE COURT.

Youth

Parent

TO THE YOUTH WHO *IS* SUBJECT TO THIS ORDER

You have certain rights regarding your record. Please read the other side of this Order where such information is provided

In Reference to: _____

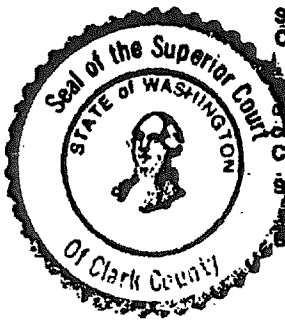
Distribution: WHITE-Court GREEN-Probation YELLOW-Youth PINK-Pros. Attorney GOLD-Counsel

I attest that I saw the same youth who appeared in Court on this document affix his/her thumbprints hereto

JOANNE McBRIDE, SUPERIOR COURT CLERK

By _____
Special Deputy

Right Thumb



STATE OF WASHINGTON }
COUNTY OF CLARK } ss.

I, Sherry W. Parker, County Clerk and Clerk of the Superior Court of Clark County, Washington, DO HEREBY CERTIFY that this document, consisting of 2 page(s), is a true and correct copy of the original now on file and of record in my office and, as County Clerk, I am the legal custodian thereof.

Signed and sealed at Vancouver, Washington this date:

5/20/10

Sherry W. Parker, County Clerk

By _____ Deputy

SUPERIOR COURT FOR CLARK COUNTY, WASHINGTON

JUVENILE

STATE OF WASHINGTON, **Plaintiff,** **vs.** **GAROLD TRENT JACOBSEN, III,** **Respondent,** **dob: 11-16-82**	**JUVIS NO. 474875 R040** **SCOMIS NO. 00-8-00598-4** ***INFORMATION***

FILED

MAY 25 2000

Jannie McBride, Clerk, Clark Co.

COMES NOW the Prosecuting Attorney in and for Clark County, State of Washington, and does by this Information, inform the Court that the above-named respondent is guilty of the offense(s) committed as follows, to-wit.

COUNT I:

That he, **GAROLD TRENT JACOBSEN, III,** in the County of Clark, State of Washington, on or about the 4th day of November, 1999, did intentionally and without the permission of RODNEY FRY, the owner or person entitled to the possession thereof, take and drive away a motor vehicle, to-wit: one 1974 Mercury, bearing Washington license number 731KCO, or, with knowledge that such motor vehicle had been unlawfully taken, did voluntarily ride in or upon such motor vehicle, in violation of RCW 9A.56.070(1), contrary to the statutes in such cases made and provided and against the peace and dignity of the State of Washington.

May 25, 2000

ARTHUR D. CURTIS
Prosecuting Attorney

Ct. I TMVOP

By: _____
RICK W. OLSON
Deputy Prosecuting Attorney
WSB #14810

HT 5'10"
WT.: 200 LBS.
HR.: BLACK
EYES: BROWN
RACE: CAUCASIAN

CLARK COUNTY PROSECUTING ATTORNEY
JUVENILE DIVISION
500 WEST 11TH STREET
PO BOX 5000
VANCOUVER, WASHINGTON 98666-5000
(360)397-2201

APPENDIX – F

http://www.columbian.com/news/2010/apr/16/arrest-made-in-gunshot-slaying-of-minnehaha-man/ (April 16, 2010)

http://www.columbian.com/news/2010/apr/20/another-arrest-in-homicide-case/ (April 20, 2010)

http://www.columbian.com/news/2010/apr/22/third-suspect-arrested-in-home-invasion-slaying/ (April 22, 2010)

http://www.columbian.com/news/2010/apr/28/fourth-suspect-arrested-in-connection-to-slaying-c/ (April 28, 2010)

http://www.columbian.com/news/2010/apr/29/fifth-person-arrested-in-december-homicide-case/ (April 29, 2010) (Garold Jacobsen)

http://www.columbian.com/news/2010/may/01/four-suspects-in-home-invasion-robbery-killing-ple/ (May, 01, 2010)

http://www.columbian.com/news/2010/may/03/sixth-homicide-suspect-appears-in-court/ (May 3, 2010)

http://www.columbian.com/news/2010/may/13/two-suspects-in-home-invasion-killing-plead-not-gu/ (May 13, 2010) (Garold Jacobsen)

Arrest made in shotgun slaying of Minnehaha man

More arrests possible, police say

By **John Branton**, Columbian Staff Reporter
Published: April 16, 2010, 6:06 PM

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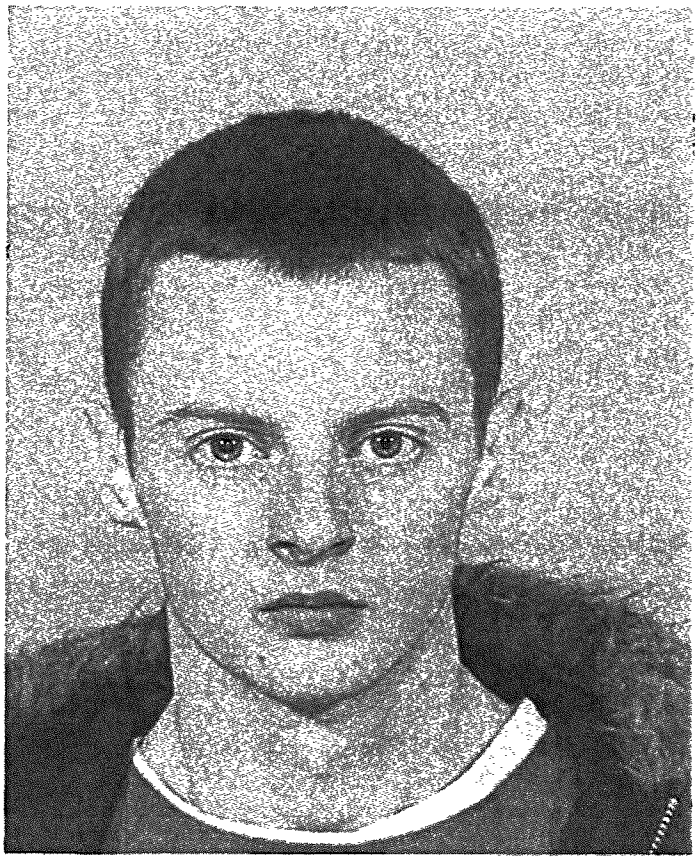

(http://media.columbian.com/img/photos/2010/04/17/Douglas_Alan_Marquis.jpg)
Douglas Alan Marquis, 23, of Vancouver, was arrested April 16, 2010, on suspicion of murder in connection with the death of Charles N. Moore of Minnehaha on Dec. 13, 2009.

Vancouver police today arrested a 23-year-old man in the shooting death of Charles N. Moore late last year at his home in the 5300 block of St. James Road, in the Minnehaha area.

Douglas Alan Marquis of Vancouver was taken to the Clark County Jail on suspicion of first-degree murder, first-degree robbery, unlawful possession of a firearm and unlawful imprisonment, according to a bulletin from the Vancouver Police Department.

The case surfaced about 11 p.m. on Dec. 13, when officers rushed to Moore's home after learning of a robbery with shots fired. Moore, 46, was found at the scene, dead of a shotgun wound to the chest, officials said.

A complex investigation followed, with detectives from the Major Crimes Unit probing leads and forensic evidence found at the scene.

At one point, Moore's family members appeared at a press conference, expressing their grief, expressing confusion about why he was slain and appealing for those with information to contact police.

"My dad was just an average person, trying to live the best he could," his daughter, Victoria Maul, said in the press conference early last month. "He was a really nice guy. He had a lot of friends and family, and he didn't really do anything wrong.

"I don't think there was anyone out there who didn't like him," she added.

(Multnomah County Sheriff's Office)

"He didn't own anything the average person didn't own, so there was no financial gain for whoever killed him."

Detective Lawrence Zapata, the lead investigator, agreed: "He led a very modest life. He owned nothing that was newer, per se."

"Just not having him there is terrible for all of us," Maul added in the press conference. "I dearly miss him."

Before the press conference, Crime Stoppers had offered a reward of up to $1,000 and detectives received valuable tips from that, police said.

Detectives "followed up on all the tips and leads that were developed," police spokeswoman Kim Kapp said Friday afternoon.

Soon after the slaying, police said they were looking for two to five men wearing masks and dark clothing.

Kapp said Friday that several people were involved in the alleged robbery and detectives may arrest more suspects in the case.

Marquis is alleged to have been the one who shot Moore, Kapp said.

Detectives still have not revealed what the alleged robbers were seeking, Kapp said.

"I'm sure the detectives are glad to have some degree of closure for the family, in view of the length of the investigation," Kapp said.

John Branton: 360-735-4513 or john.branton@columbian.com (mailto:john.branton@columbian.com).

John Branton (/staff/john-branton/)

Columbian Staff Reporter

360-735-4513

Send an Email (mailto:john.branton@columbian.com)

More Like This

Second man arrested in home-invasion slaying

Vancouver man allegedly hit victim's roommate with gun

By Laura McVicker, Columbian staff writer
Published: April 20, 2010, 1:56 PM

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(http://media.columbian.com/img/photos/2010/04/20/20100420-135257-pic-495465976.jpg)
Caleb E. Soucy
(Vancouver Police Department)

A second suspect has been arrested in connection with the home-invasion robbery and slaying of Charles N. Moore.

Caleb Eugene Soucy, 28, of Vancouver made a first appearance in Clark County Superior Court on Tuesday on suspicion of being an accomplice to first-degree murder, three counts of first-degree robbery, first-degree assault and unlawful imprisonment.

Superior Court Judge Roger Bennett set bail at $1 million and appointed attorney Mike Foister to represent him.

Prosecutors allege Soucy was one of the masked men who accompanied slaying suspect Douglas Alan Marquis to Moore's home in the 5300 block of Northeast St. James Road last Dec. 13. Marquis is accused of fatally shooting Moore, while two or three masked men are suspected of robbing and ransacking the home, where two of the victim's roommates also were present.

Marquis was arrested Friday on suspicion of murder,0 among other charges.

Court records indicate one of the roommates was pistol-whipped by one of the intruders — alleged to be Soucy — when he didn't answer a question appropriately.

Prosecutors allege the same anonymous witnesses who reported Marquis bragged about the killing afterward also implicated Soucy in the crime. One of the witnesses reported seeing Soucy enter Moore's home and detain the roommate in a back room, according to court documents.

"Witness No. 7 stated they saw Caleb flee Charlie Moore's (home) moments after Charlie was killed," according to a probable cause affidavit filed by Vancouver police Detective Lawrence Zapata.

In addition, cell phone records — which reportedly showed Marquis was in the area of Moore's home at the time of the killing — showed Soucy was in the area, too, according to court records.

Both Soucy and Marquis will be arraigned Friday.

Laura McVicker (/staff/laura-mcvicker/)

Columbian staff writer

360-735-4516

Send an Email (mailto:laura.mcvicker@columbian.com)

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Community guidelines (/guidelines/)

BLOGS (HTTP://BLOGS.COLUMBIAN.COM) +

Third suspect arrested in home-invasion slaying

Woman, 23, suspected of being getaway driver

By **Laura McVicker**, Columbian staff writer
Published: April 22, 2010, 10:50 AM

0

A third suspect has been arrested in connection with the home-invasion robbery and slaying of Charles N. Moore last December.

Minna R. Long, 23, of Vancouver made her first appearance Thursday morning in Clark County Superior Court on suspicion of first-degree murder as an accomplice and three counts of first-degree robbery.

Superior Court Judge Barbara Johnson set her bail at $1 million.

Long will be arraigned April 30 with Douglas Marquis, 22, and Caleb Soucy, 28, both of Vancouver.

Marquis is accused of fatally shooting Moore Dec. 13 at his home in the 5300 block of Northeast St. James Road, while two or three masked intruders are suspected of robbing and ransacking the home.

Soucy — alleged to be one of those intruders — is accused of pistol-whipping one of Moore's roommates during the event, according to court documents.

Prior convictions

Long was arrested on a warrant by Vancouver police detectives at a residence in Brush Prairie on Wednesday.

The warrant alleges Long, who is Soucy's girlfriend, was the getaway driver following the alleged slaying.

An anonymous witness told investigators Long was seen driving her maroon Jeep the wrong way on St. James Road before pulling in front of Moore's house. Then the witness saw Marquis and Soucy jump into Long's Jeep following the alleged slaying. The driver made make a U-turn and sped away, court records indicate.

Long, a Clark College student, has several prior convictions, including a robbery conviction relating to a 2006 home-invasion robbery in which she was accused of serving as a getaway driver, according to court records. She served a 45-month sentence.

Clark County Deputy Prosecutor Kasey Vu said Thursday there's a possibility of more arrests.

Laura McVicker: 360-735-4516 or laura.mcvicker@columbian.com.

Laura McVicker (/staff/laura-mcvicker/)

Columbian staff writer

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Fourth suspect arrested in connection to slaying case

By **Laura McVicker**, Columbian staff writer
Published: April 28, 2010, 10:07 AM

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A fourth suspect has been arrested in connection to the robbery and slaying of Charles N. Moore in December.

Joshua B. McAlexander, 30, made his first appearance Wednesday on suspicion of three counts of first-degree robbery.

Clark County Superior Court Judge Diane Woolard set bail at $500,000 and appointed attorney Clark Fridley to represent him.

Deputy Prosecutor Kasey Vu subsequently filed paperwork alleging there also was probable cause for McAlexander to be held in jail on suspicion of first-degree murder as an accomplice.

A tip led Vancouver police officers to McAlexander. A witness told police a man with bullet holes tattooed on his forehead was involved in the Dec. 13 home-invasion and fatal shooting of Moore at his home in the 5300 block of Northeast St. James road, according to court papers. A total of four or five masked intruders are believed to have entered the home.

McAlexander, currently an inmate at the Clark County Jail for a probation violation, fit that description. Upon questioning, McAlexander allegedly told police he was present during the shooting but didn't take anything, according to court papers.

Court papers indicate he went on to say he was in the house for a prolonged period of time and when he left, the alleged shooter, Douglas Marquis, had a shopping bag of stolen goods.

Three other suspects — Marquis, 22, Caleb Soucy and the alleged getaway driver, Minna Long, 23 — have been arrested as the investigation progresses.

Court records said "items of value" belonging to Moore were taken — though they weren't specified — and a roommate's antique item also was stolen.

An exact motive hasn't been revealed.

Vu described the investigation Wednesday as still ongoing, with the possibility of more arrests.

The four suspects will be arraigned Friday.

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Fifth person arrested in December robbery-slaying

By **Laura McVicker**, Columbian staff writer
Published: April 29, 2010, 9:49 AM

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Police have arrested a fifth person in connection with the home-invasion robbery and slaying of a Vancouver man.

Garold T. Jacobsen, 27, made his first appearance Thursday in Clark County Superior Court on suspicion of first-degree murder as an accomplice and three counts of first-degree robbery.

Judge John Nichols set bail at $1 million.

Jacobsen, who lives in the Vancouer area, is alleged to have been among a group of masked intruders who entered Charles N. Moore's home on Dec. 13 in the 5300 block of Northeast St. James Road. Undisclosed items were taken and Moore, 46, was shot in the chest and killed.

Moore's two roommates told police the assailants ransacked the home. Court records don't reveal what was stolen or a motive for the killing.

It wasn't clear from investigators if Moore even knew his assailants.

Douglas Marquis, 22, was arrested as the suspected shooter after allegedly bragging to people about the killing afterward. Several anonymous witnesses also pointed investigators to alleged accomplices Caleb Soucy, 28; Minna Long, 23; and Joshua McAlexander, 30.

Marquis, Soucy, Long and McAlexander will be arraigned today. Jacobsen will be arraigned May 13.

Deputy Prosecutor Kasey Vu on Thursday described the investigation as ongoing, with the possibility of even more arrests.

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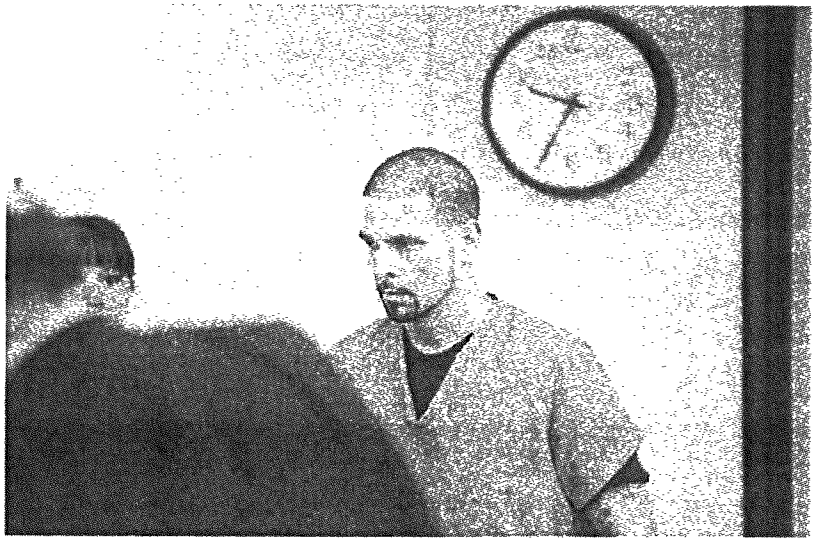
Four suspects in home-invasion robbery, killing plead not guilty

Another suspect to be arraigned May 13; sixth suspect arrested Friday



(http://media.columbian.com/img/croppedphotos/2010/05/01/960697.jpg)

Joshua McAlexander, a suspect in the killing of Charles N. Moore, pleaded not guilty Friday to murder and robbery cha
(Vivian Johnson)

By **Laura McVicker**, Columbian staff writer
Published: May 1, 2010, 6:00 AM

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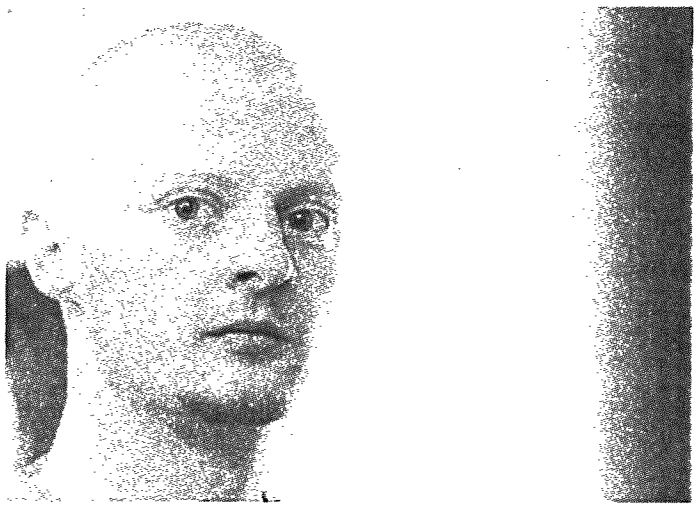

(http://media.columbian.com/img/photos/2010/04/30/20100430-190331-pic-175588728.jpg)
Douglas Marquis

A A

Four people suspected in a home-invasion killing of a Vancouver man pleaded not guilty Friday in Clark County Superior Court to murder and robbery charges.

Meanwhile, a fifth suspect is due back in court May 13 for arraignment and a sixth suspect was arrested Friday.

The suspects appeared in connection to the Dec. 13 homicide of 46-year-old Charles N. Moore at his home in the Minnehaha area.

Douglas A. Marquis, 22, is suspected of shooting Moore. Joshua B. McAlexander, 30, Caleb E. Soucy, 28, and Minna R. Long, 23, are charged with first-degree murder as accomplices.

They are alleged to have accompanied Marquis to the home when the killing occurred, charging documents state.

McAlexander appeared in court first and entered his not-guilty plea to first-degree murder and three counts of first-degree robbery.

Later in the afternoon, Long — the alleged getaway driver — and Marquis and Soucy pleaded not guilty to the same charges. Soucy and Marquis also face a charge of unlawful possession of a firearm.

Trial for all four suspects was set for June 21.

The suspects, who are all from Vancouver or don't have listed addresses, remain in the Clark County Jail on $1 million bail.

A fifth suspect, Garold T. Jacobsen, 27, was arrested Wednesday. He will be arraigned May 13.

A sixth suspect, Cathleen M. Potter, 46, was arrested Friday and will make a first appearance in court Monday, said Senior Deputy Prosecutor John Fairgrieve.

Friday afternoon, Potter was being held in jail on suspicion of first-degree murder, first-degree robbery and first-degree burglary.

Fairgrieve said Potter was not part of the group who invaded Moore's home. But her arrest "related to the conduct of the other individuals," he said, declining further comment.

Authorities have remained mum about the investigation, not revealing what items were taken from Moore's house in the 5300 block of Northeast St. James Road or a motive.

Moore, a longtime resident of the area, was disabled and lived on a fixed income. He died of a shotgun blast to the chest after a group of robbers came to his home about 11 p.m. on a Sunday.

Outside court Friday, Moore's daughter, Victoria Maul, said she'd never heard of any of the suspects and couldn't say whether her father knew them.

Asked whether she was relieved arrests were made, Maul said: "It's something I really don't know how to feel about it."

Fairgrieve said he doesn't expect any more arrests.

"Some aspects are continuing, but the majority of the investigation has been concluded," he said.

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Sixth slaying suspect appears in court

(http://media.columbian.com/img/croppedphotos/2010/05/03/20100503-102722-pic-342988083.jpg)

Cathleen M. Potter, 46, of Camas made her first appearance in Clark County Superior Court in connection to the December homicide of Charles N. Moore. (Steven Lane (/staff/steven-lane/)/The Columbian)

By **Laura McVicker**, Columbian staff writer
Published: May 3, 2010, 10:29 AM
Updated: May 3, 2010, 4:02 PM

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Cathleen M. Potter made her first appearance Monday in Clark County Superior Court in connection with the December robbery and slaying of Vancouver resident Charles N. Moore.

A A

Superior Court Judge John Nichols set bail at $1 million for Potter, 46, and appointed attorney Tom Phelan to represent her.

The Camas woman is being held in the Clark County Jail on suspicion of first-degree murder, first-degree robbery and first-degree burglary.

Prosecutors have not revealed how Potter is connected to the slaying, saying only that her actions are "related to the conduct of the other individuals." Prosecutors believe she wasn't part of the group who invaded Moore's home.

The killing happened Dec. 13 at Moore's home in the 5300 block of Northeast St. James Road. One of the four or five masked intruders who entered Moore's home shot him in the chest. The others ransacked the place, police said.

Two of Moore's roommate were present during the killing. After Moore was shot, the female roommate said she was forced to sit in the room where he lay dead.

The other roommate said he was pistol-whipped by one of the intruders when he didn't answer a question appropriately, according to court documents.

Undisclosed items were taken. A motive wasn't revealed and it's unknown whether the suspects even knew Moore.

Five people, including the suspected shooter, Douglas A. Marquis, 22, have been arrested in connection with the robbery and killing.

Also facing charges are Caleb E. Soucy, 28; Joshua B. McAlexander, 30; Garold T. Jacobsen, 27; and Minna R. Long, 23. The three men are accused of accompanying Marquis to Moore's home; Long is alleged to be the getaway driver.

Potter will be arraigned May 13

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Man pleads not guilty in home-invasion killing

He, another suspect appear in court; judge will decide if all 6 will go to trial together

(http://media.columbian.com/img/photos/2010/05/13/20100513-174637-pic-850442173.jpg)

Cathleen Potter

By Laura McVicker, Columbian staff writer
Published: May 13, 2010, 9:41 PM

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One of six people charged in connection with the home-invasion killing of Charles N. Moore pleaded not guilty to murder and robbery Thursday in Clark County Superior Court. Meanwhile, a second suspect appeared but asked the judge to postpone her arraignment.

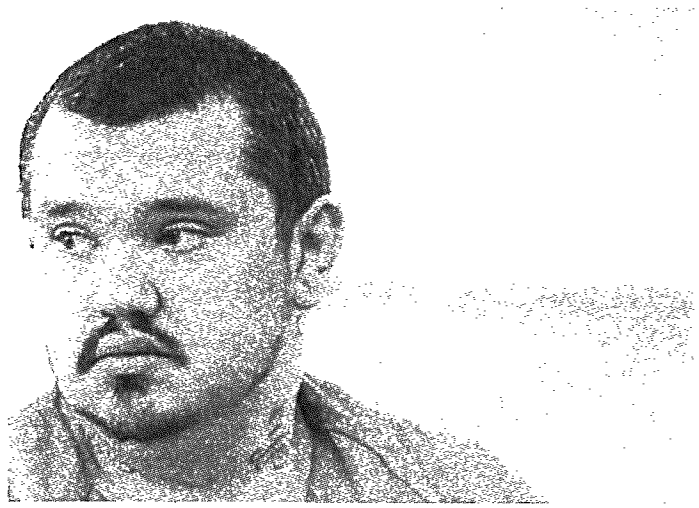
Judge Roger Bennett set a trial date of June 21 for Garold T. Jacobsen, 27, of Vancouver and Cathleen M. Potter, 46, of Camas.

Potter's attorney, Tom Phelan, wanted to delay Potter's arraignment so he could set a separate trial date.

But Bennett said he'd take up that issue at a June 1 hearing: whether the defendants will proceed to trial together or be tried separately.

The same goes for the other four defendants — Douglas A. Marquis, Caleb E. Soucy, Minna R. Long and Joshua B. McAlexander. They all have the same trial date, but that could change.

"There's a lot of work to be done" in the investigation and preparing for trial, Bennett said.



(http://media.columbian.com/img/photos/2010/05/13/20100513-174637-pic-502899961.jpg)
Garold Jacobsen

Charges relate to the robbery and slaying of Moore, 46, on Dec. 13 at his home in the 5300 block of Northeast St. James Road. Four or five masked intruders entered the home, when one of them, Marquis, allegedly shot Moore in the chest. The others ransacked the place, police said.

Two of Moore's roommates were present during the killing and held against their will, police said.

Undisclosed items were taken. A motive wasn't revealed, and it's unknown whether the suspects even knew Moore.

Potter, charged with second-degree murder as an accomplice, allegedly provided details to the group that led them to Moore's home, said Deputy Prosecutor Kasey Vu. She wasn't present during the event, said Vu, who declined to offer further details.

Jacobsen, charged with first-degree murder and three counts of first-degree robbery as an accomplice, allegedly was the lookout person. However, Jacobsen's attorney, Bob Yoseph, told the judge: "He may or may not have been in the house when the shot was fired."

Vu added that Jacobsen also momentarily stepped inside and is believed to have taken part in the robbery.

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APPENDIX – G

12

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Sherry W. Parker, Clerk, Clark Co.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON, Plaintiff, v. JOSE MIGUEL GASTEAZORO-PANIAGUA, Defendant.	No. 10-1-00004-6 STATE'S MEMORANDUM OF LAW CONCERNING THE ADMISSIBILITY OF TRUTHFULNESS PROVISIONS OF PLEA AGREEMENTS AT TRIAL

COMES NOW the State of Washington, represented by its deputy prosecuting attorney John Fairgrieve, to inform the court of the law applicable to the issue of the admissibility of truthfulness provisions in a plea agreement between a witness and the State during a criminal trial.

I. Facts Relevant to this Issue

In an information filed on April 29, 2010 in Clark County Superior Court Garold Trent Jacobson was charged with multiple felonies, including murder in the first degree, for his alleged involvement in a home invasion robbery that occurred on December 13, 2009. *See* Exhibit 1. On May 28, 2010 he signed a cooperation agreement wherein he agreed, among other things, to "provide complete and truthful testimony at any hearing

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or trial in the matters listed in Section 2 of this agreement." The instant case is one of those listed in section 2. *See* Exhibit 2, p. 2. The agreement also contains the following provision: "The parties stipulate the defendant will be in breach of this agreement if the defendant makes any statement at any interview, hearing or trial that is not completely truthful." *Id. at* p. 3. The defendant has moved the court to redact the foregoing provisions from Jacobson's Cooperation Agreement prior to it being referred to or offered as evidence in this case. The defendant has also moved to strike the next to last paragraph from Section 2 of the Cooperation Agreement discussing the use of polygraph examinations to verify the truthfulness of the defendant's statements. The State does not oppose the redaction of this paragraph.

II. Argument

1. The two provisions of Jacobson's Cooperation Agreement requiring that he testify truthfully should not be redacted from the agreement. Doing so will potentially mislead the jury as to the context of Jacobson's testimony.

In a case filed in May of this year, Division I of the Court of Appeals addressed the issue of the admissibility of a provision that a witness "testify truthfully" in a plea agreement. In *State v. Coleman,* 155 Wn. App. 951 (2010) the defendant was charged with robbery in the first degree and other crimes. At trial Coleman's co-defendant, Sean Phillips, testified. The trial court admitted Phillip's plea agreement which contained the phrase: "The defendant's most important obligation pursuant to this agreement is to testify truthfully." It continued, stating that: "In the event that the defendant "is deceptive, untruthful, [or] incomplete," the State could terminate the agreement." The prosecutor asked Phillips questions about the plea agreement on direct examination and Phillips testified about his obligations and the sentence he had received as a result of the plea

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agreement. He also testified that Coleman procured a gun for him and drove him to the location of the robbery. Coleman was convicted of the robbery and other charges. *Coleman* at 956.

On appeal Coleman argued that the prosecutor at trial committed misconduct by admitting a plea agreement with a witness for the State that contained a truthfulness provision or by examining the witness about the agreement. The Court of Appeals disagreed, and in doing so discussed what it stated are the two leading cases in the State of Washington addressing the admissibility of truthfulness provisions in plea agreements; *State v. Green*, 119 Wn. App. 15, 79 P. 3d 460 (2003) and *State v. Ish*, 150 Wn. App. 775, 208 P. 3d 1281 (2009)(review granted by, in part State v. Ish, 167 Wn.2d 1005, 220 P.3d 783 (2009)). In applying *Green* and *Ish* to the facts in Coleman the Court of Appeals stated the following:

> We do not find *Ish* at odds with *Green*. While following *Ish*'s reasoning, we agree with the *Green* court that irrelevant and prejudicial statements should be redacted from immunity or plea agreements upon request. We also acknowledge that under certain circumstances, such as those in *Green*, statements requiring the witness to "testify truthfully" might be construed as vouching. In *Green*, the requirement that the witness testify truthfully was admitted in the context that the State knew the witness's testimony and entered the agreement to "secure" it. But the circumstances regarding the agreement in *Ish* were different. There, the trial court redacted an irrelevant and prejudicial provision so that the witness's promise to testify truthfully stood alone, not in the context of the State's intent.
>
> Similarly here, there was no declaration of the State's intent in entering the agreement. There were no aspects of the agreement that implicated Coleman's guilt. As in *Ish*, the only statements in contention were that Phillips testify

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> truthfully at trial. We find that under the circumstances here, the agreement merely set the context for Phillip's testimony. *Coleman* at 958-959.

State v. Ish, supra, involved an allegation that the defendant beat his girlfriend to death. Ish was convicted and appealed, alleging among other things that the prosecutor committed misconduct by vouching for an informant's credibility. At trial the prosecution called a witness, David Otterson, a former cellmate of Ish's, to testify to about statements Ish allegedly made to him about the killing. *Ish* at 781. The State wanted to show that in his plea agreement Otterson promised to testify truthfully. "The trial court ruled that the State could not vouch for the truth of Otterson's testimony, but that the term could be "point[ed] out" because "[o]therwise, the defense will be dangling the possibility that the State has an agreement that says, 'You can lie as much as you want to. We just want you to get up there and testify.'" *Id.* In rejecting the Ish's argument that the prosecutor committed misconduct, the Court of Appeals stated:

> While it is improper for a prosecutor to vouch for the credibility of a witness, no prejudicial error arises unless counsel clearly and unmistakably expresses a personal opinion as opposed to arguing an inference from the evidence. *State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008) (citing *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995)), *cert. denied*, 129 S. Ct. 2007 (2009). No such opinion was apparent here.
>
> The circumstances here are similar to those in *State v. Kirkman*, 159 Wn.2d 918, 925, 155 P.3d 125 (2007), a child rape case where a detective testified that before he interviewed the victim, he elicited the victim's promise to tell the truth. On appeal, the defendant argued that the officer had vouched for the victim's credibility. Although the issue in

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> error at all, not the possible level of harm: "[the detective's] testimony is simply an account of the interview protocol he used to obtain [the victim's] statement." *Kirkman*, 159 Wn.2d at 931. Thus, the testimony "'merely provided the necessary context that enabled the jury to assess the reasonableness of the ... responses.'" *Kirkman*, 159 Wn.2d at 931 (alteration in original) (quoting *State v. Demery*, 144 Wn.2d 753, 764, 30 P.3d 1278 (2001)). Similarly here, the testimony that Otterson's plea agreement required him to testify truthfully merely set the context for the jury to evaluate his testimony. The trial court did not abuse its discretion in admitting that evidence.
>
> *Ish* at 786-87.

In the instant case the Cooperation Agreement simply requires that Jacobson "provide complete and truthful testimony at any hearing or trial in the matters listed in Section 2 of this agreement." It is factually closer to *Coleman* and *Ish, supra,* than *Green, supra*, and it does not contain language similar to that the court in *Green* found objectionable, specifically that "the intent of the agreement was to "secure the true and accurate testimony" of the cooperating witness. *Green* at 24. Consequently, the defendant's motion to redact the provisions relating to truthful testimony in Jacobson's Cooperation Agreement should be denied.

Dated this 21st day of June, 2010.

Arthur D. Curtis
Prosecuting Attorney

John P. Fairgrieve, WSBA #23107
Deputy Prosecuting Attorney

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#1

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON, Plaintiff, v.	**AMENDED INFORMATION**
DOUGLAS ALLEN MARQUIS and	No. 10-1-00596-0
CALEB EUGENE SOUCY and	No. 10-1-00597-8
MINNA REBECCA LONG	No. 10-1-00607-9
and	**INFORMATION**
JOSHUA BLU MCALEXANDER and	No. 10-1-00667-2
GAROLD TRENT JACOBSEN Defendant.	No. 10-1-00669-9 (VPD 09-23361)

COMES NOW the Prosecuting Attorney for Clark County, Washington, and does by this inform the Court that the above-named defendant is guilty of the crime(s) committed as follows, to wit:

COUNT 01 - MURDER IN THE FIRST DEGREE - 9A.08.020(3) /9A.32.030(1)(c)
That they, MINNA REBECCA LONG and DOUGLAS ALLEN MARQUIS and GAROLD TRENT JACOBSEN and CALEB EUGENE SOUCY and JOSHUA BLU MCALEXANDER, together and each of them, in the County of Clark, State of Washington, on or about December 13, 2009, did commit or attempt to commit the crime of burglary in the first degree, and in the course of or in furtherance of such crime or in immediate flight therefrom, the Defendant, or another participant, caused the death of a person other than one of the participants, to-wit: Charles Moore; contrary to Revised Code of Washington 9A.32.030(1)(c) and/or was an accomplice to said crime pursuant to RCW 9A.08.020.

And further, that the defendant, or an accomplice, did commit the foregoing offense while armed with a firearm as that term is employed and defined in RCW 9.94A.825 and RCW 9.94A.533(3), to-wit: a shotgun.

This crime is a 'most serious offense' pursuant to the Persistent Offender Accountability Act (RCW 9.94A.030(29), RCW 9.94A.030(34), RCW 9.94A.505(2)(a)(iii) and RCW 9.94A.570).

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Exhibit 1

COUNT 02 - ROBBERY IN THE FIRST DEGREE - 9A.08.020(3) /9A.56.190/9A.56.200(1)(a)(i)
That they, MINNA REBECCA LONG and DOUGLAS ALLEN MARQUIS and GAROLD TRENT JACOBSEN and CALEB EUGENE SOUCY and JOSHUA BLU MCALEXANDER, together and each of them, in the County of Clark, State of Washington, on or about December 13, 2009, with intent to commit theft, did unlawfully take personal property that the Defendant did not own from the person or in the presence of Charles Moore, against such person's will, by use or threatened use of immediate force, violence, or fear of injury to said person or the property of said person or the person or property of another, and in the commission of said crime or in immediate flight therefrom, the Defendant was armed with a deadly weapon, to-wit: a shotgun; contrary to Revised Code of Washington 9A.56.200(1)(a)(i), 9A.56.190 and/or was an accomplice to said crime pursuant to RCW 9A.08.020.

And further, that the defendant, or an accomplice, did commit the foregoing offense while armed with a firearm as that term is employed and defined in RCW 9.94A.825 and RCW 9.94A.533(3), to-wit: a shotgun.

This crime is a 'most serious offense' pursuant to the Persistent Offender Accountability Act (RCW 9.94A.030(29), RCW 9.94A.030(34), RCW 9.94A.505(2)(a)(iii) and RCW 9.94A.570).

COUNT 03 - ROBBERY IN THE FIRST DEGREE - 9A.08.020(3) /9A.56.190/9A.56.200(1)(a)(i)
That they, MINNA REBECCA LONG and DOUGLAS ALLEN MARQUIS and GAROLD TRENT JACOBSEN and CALEB EUGENE SOUCY and JOSHUA BLU MCALEXANDER, together and each of them, in the County of Clark, State of Washington, on or about December 13, 2009, with intent to commit theft, did unlawfully take personal property that the Defendant did not own from the person or in the presence of Arlene M. Stokes, against such person's will, by use or threatened use of immediate force, violence, or fear of injury to said person or the property of said person or the person or property of another, and in the commission of said crime or in immediate flight therefrom, the Defendant was armed with a deadly weapon, to-wit: a shotgun; contrary to Revised Code of Washington 9A.56.200(1)(a)(i), 9A.56.190 and/or was an accomplice to said crime pursuant to RCW 9A.08.020.

And further, that the defendant, or an accomplice, did commit the foregoing offense while armed with a firearm as that term is employed and defined in RCW 9.94A.825 and RCW 9.94A.533(3), to-wit: a shotgun.

This crime is a 'most serious offense' pursuant to the Persistent Offender Accountability Act (RCW 9.94A.030(29), RCW 9.94A.030(34), RCW 9.94A.505(2)(a)(iii) and RCW 9.94A.570).

COUNT 04 - ROBBERY IN THE FIRST DEGREE - 9A.08.020(3)
/9A.56.190/9A.56.200(1)(a)(ii)/9A.56.200(1)(a)(iii)
That they, MINNA REBECCA LONG and DOUGLAS ALLEN MARQUIS and GAROLD TRENT JACOBSEN and CALEB EUGENE SOUCY and JOSHUA BLU MCALEXANDER, together and each of them, in the County of Clark, State of Washington, on or about December 13, 2009, with intent to commit theft, did unlawfully take personal property that the Defendant did not own from the person or in the presence of Alan S. Klein, against such person's will, by use or threatened use of immediate force, violence, or fear of injury to said person or the property of said person or the person or property of another, and in the commission of said crime or in immediate flight therefrom, the Defendant inflicted bodily injury upon Alan S. Klein; contrary to Revised Code of Washington 9A.56.200(1)(a)(iii), 9A.56.190 and/or was an accomplice to said crime pursuant to RCW 9A.08.020.

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And further, that the defendant, or an accomplice, did commit the foregoing offense while armed with a firearm as that term is employed and defined in RCW 9.94A.825 and RCW 9.94A.533(3), to-wit: a shotgun.

And further, that the defendant, or an accomplice, did commit the foregoing offense while armed with a firearm as that term is employed and defined in RCW 9.94A.825 and RCW 9.94A.533(3), to-wit: a pistol.

This crime is a 'most serious offense' pursuant to the Persistent Offender Accountability Act (RCW 9.94A.030(29), RCW 9.94A.030(34), RCW 9.94A.505(2)(a)(iii) and RCW 9.94A.570).

COUNT 05 - UNLAWFUL POSSESSION OF A FIREARM IN THE SECOND DEGREE - 9.41.040(2)(a)

That he, DOUGLAS ALLEN MARQUIS, in the County of Clark, State of Washington, on or about December 13, 2009, after having previously been convicted in the State of Washington or elsewhere, of the crime of Theft in the First Degree, in 05-8-01005-9, a juvenile offense in Clark County, Washington, and Identity Theft in the Second Degree, in Clark County Cause number 07-1-01108-1, and TMVWOP in the Second Degree, under Clark County Washington number 08-1-00732-4, did knowingly own or have in his possession or control a firearm, to-wit: a shotgun, contrary to Revised Code of Washington RCW 9.41.040(2)(a)(i).

COUNT 06 - UNLAWFUL POSSESSION OF A FIREARM IN THE SECOND DEGREE - 9.41.040(2)(a)

That he, CALEB EUGENE SOUCY, in the County of Clark, State of Washington, on or about December 13, 2009, after having previously been convicted in the State of Washington or elsewhere, of the crime of Unlawful Possession of a Firearm in the Second Degree, in Clark County Juvenile Cause number 99-8-00046-9, Unlawful Possession of a Firearm in the Second Degree, Possession of a Controlled Substance- Methamphetamine in Clark County Cause number 04-1-01372-1, and Bail Jumping on B or C Felony and Possession of a Controlled Substance-Methamphetamine (2 counts) in Clark County Cause number 07-1-00203-1, did knowingly own or have in his possession or control a firearm, to-wit: a pistol, contrary to Revised Code of Washington RCW 9.41.040(2)(a)(i).

COUNT 07 - UNLAWFUL POSSESSION OF A FIREARM IN THE SECOND DEGREE - 9.41.040(2)(a)

That he, CALEB EUGENE SOUCY, in the County of Clark, State of Washington, on or about December 13, 2009, after having previously been convicted in the State of Washington or elsewhere, of the crime of Unlawful Possession of a Firearm in the Second Degree, in Clark County Juvenile Cause number 99-8-00046-9, Unlawful Possession of a Firearm in the Second Degree, Possession of a Controlled Substance- Methamphetamine in Clark County Cause number 04-1-01372-1, and Bail Jumping on B or C Felony and Possession of a Controlled Substance-Methamphetamine (2 counts) in Clark County Cause number 07-1-00203-1, did knowingly own or have in his possession or control a firearm, to-wit: a revolver, contrary to Revised Code of Washington RCW 9.41.040(2)(a)(i).

ARTHUR D. CURTIS
Prosecuting Attorney in and for
Clark County, Washington

Date: April 29, 2010

BY: _____
Kasey T. Vu, WSBA #31528
Deputy Prosecuting Attorney

CLARK COUNTY PROSECUTING ATTORNEY
1013 FRANKLIN STREET
PO BOX 5000
VANCOUVER, WASHINGTON 98666-5000
(360) 397-2261

DEFENDANT: DOUGLAS ALLEN MARQUIS			
RACE: W	SEX: M	DOB: 12/25/1987	
DOL: MARQUDA133R5 WA		SID: WA22347992	
HGT: 510	WGT: 160	EYES: GRN	HAIR: BRO
WA DOC: 308832		FBI: 860945EC0	
LAST KNOWN ADDRESS(ES):			

DEFENDANT: CALEB EUGENE SOUCY			
RACE: W	SEX: M	DOB: 8/27/1981	
DOL: SOUCY-CE-197N7 WA		SID: WA18511803	
HGT: 600	WGT: 170	EYES: HAZ	HAIR: XXX
WA DOC: 876801		FBI: 654353EC7	
LAST KNOWN ADDRESS(ES):			
HOME - 17009 SE 17TH WY, VANCOUVER WA			

DEFENDANT: MINNA REBECCA LONG			
RACE: W	SEX: F	DOB: 12/15/1986	
DOL: LONG*-MR-143RN WA		SID: WA22776758	
HGT: 502	WGT: 130	EYES: BLU	HAIR: BRO
WA DOC: 302538		FBI: 6413JC6	
LAST KNOWN ADDRESS(ES):			

DEFENDANT: JOSHUA BLU MCALEXANDER			
RACE: W	SEX: M	DOB: 5/16/1979	
DOL: MCALE-JB-218KW WA		SID: WA23213619	
HGT: 601	WGT: 180	EYES: BRO	HAIR: BRO
WA DOC: 893996		FBI: 116840JB7	
LAST KNOWN ADDRESS(ES):			

DEFENDANT: GAROLD TRENT JACOBSEN			
RACE: W	SEX: M	DOB: 11/16/1982	
DOL: JACOB-GT-180QW WA		SID: WA19854135	
HGT: 511	WGT: 205	EYES: BRO	HAIR: BRO
WA DOC:		FBI: 315146WB5	
LAST KNOWN ADDRESS(ES):			
HOME - 11712 NE 15TH ST, VANCOUVER WA			

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON, Plaintiff, v. GAROLD TRENT JACOBSEN, Defendant.	No. 10-1-00669-9 COOPERATION AGREEMENT

SECTION 1
CHARGES

Garold Trent Jacobsen is currently charged with the crimes of Murder in the first Degree and three counts Robbery in the First Degree, each with a Firearm Enhancement. Garold Trent Jacobsen shall be referred to as Defendant in this cooperation agreement.

If the Defendant is convicted as charged in this matter, Defendant's standard sentencing range will be 610 to 733 months in prison.

SECTION 2
DEFENDANT'S AGREEMENT

The Defendant agrees to cooperate with the State in the prosecution of the following cases:

State of Washington v. Jose Gasteazoro-Paniagua, Cause No. 10-1-00004-6

State of Washington v. Douglas Marquis, Cause No. 10-1-00596-0

State of Washington v. Caleb Soucy, Cause No. 10-1-00597-8

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Exhibit 2

State of Washington v. Minna Long, Cause No. 10-1-00607-9

State of Washington v. Joshua Blu McAlexander, Cause No. 10-1-00667-2

State of Washington v. Cathleen Potter, Cause No. 10-1-00714-8

The Defendant agrees to provide complete and truthful testimony at any hearing or trial in the matters listed in Section 2 of this agreement.

The Defendant agrees to make himself available for any interview at the request of Deputy Prosecuting Attorneys Kasey Vu, John Fairgrieve, or any other Deputy Prosecuting Attorney assigned to any of the matters listed at Section 2 of this agreement and give full and truthful answers to any questions asked of Defendant at any interview.

The Defendant agrees to submit to polygraph examinations at the request of the State to verify the truthfulness of Defendant's statements. The Defendant agrees to submit to such examination at whatever time the State requests and the Defendant agrees to submit to multiple polygraph examinations if the State requests multiple examinations.

After meeting the conditions listed in this section, the Defendant agrees to plead guilty to amended charges of three counts of Robbery in the First Degree with one Deadly Weapon Enhancement, and stipulate to a sentence of 126 months in prison.

SECTION 3
STATE'S AGREEMENT

In exchange for the Defendant's cooperation as listed above in SECTION 2 of this agreement, the State agrees to do the following:

After the defendant completes all conditions listed in section 2, Defendant's Agreement, the State will amend the charges against the defendant and file three counts of Robbery in the First Degree with one Deadly Weapon Enhancement, and at the sentencing hearing on the amended charges, the State will recommend a sentence of 126 months in prison.

SECTION 4
BREACH OF AGREEMENT

In the event the Defendant breaches this agreement, the Defendant agrees the State will be allowed to proceed against the Defendant on the original charges or any additional charges the State chooses to file. If the Defendant breaches this agreement, the Defendant agrees the State can use any statements the Defendant makes pursuant to this cooperation agreement

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against the Defendant in a prosecution of the Defendant, including any statement the defendant made in negotiation of this agreement including a recorded "free talk".

The parties stipulate the defendant will be in breach of this agreement if the defendant makes any statement at any interview, hearing, or trial that is not completely truthful.

~~The parties stipulate that in any motion to find the defendant breached this agreement, the results of any polygraph examination the defendant takes pursuant to this agreement would be admissible for the purpose of determining whether the defendant breached this agreement by making any untruthful statement.~~ JT GT

The Defendant stipulates and agrees he will be in breach of this agreement if he fails to comply with all terms listed in section 2 (Defendant's Agreement) of this cooperation agreement.

SECTION 5
CONFIRMATION

The parties hereby confirm that this cooperation agreement, consisting of 3 pages, contains all agreements between the State of Washington and Garold Trent Jacobsen.

Dated, this 28th day of May, 2010

Kasey T. Vu WSBA# 31528
Deputy Prosecuting Attorney

Garold Trent Jacobsen
Defendant

J. R. Yoseph WSBA# 8627
Attorney for Defendant

Witnessed:

EDWARD L. DOTTERLY, WSBA 8727

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APPENDIX – H

5

IN THE SUPERIOR COURT OF WASHINGTON FOR CLARK COUNTY

STATE OF WASHINGTON, Plaintiff, vs. JOSE GASTEAZORO-PANIAGUA, Defendant.	NO. 10-1-00004-6 DEFENSE'S RESPONSE TO STATE'S RESPONSE TO DEFENDANT'S MOTION FOR NEW TRIAL

COMES NOW Charles H. Buckley, Jr. representing the defendant, JOSE GASTEAZORO-PANIAGUA, and respectfully submits this response to the State's Response to Defendant's Motion for New Trial.

ISSUE

I. Did Detective O'Dell Make a Comment Regarding the Guilt of the Defendant

Detective O'Dell identifying Mr. Gasteazoro was a comment regarding the guilt of Mr. Gasteazoro. It is clear that Detective O'Dell identifying the person in the black hoodie as Mr. Gasteazoro clearly was a comment regarding Mr. Gasteazoro and his participation at the scene. Since the of the State's case revolved around the person in the black hoodie

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167

being the shooter of the victim it is clear that by commenting that that person was in fact was Mr. Gasteazoro even though he had no actual knowledge of the person, clearly was a comment on the guilt of the defendant.

II. Prosecutorial Misconduct

As to the prosecutorial misconduct it is clear that the Prosecutor violated his duty to the defense in failing to provide the information and evidence which they were testing in the DNA matter in a reasonable and timely manner. Their failure to so provide it in such a manner was in violation of CrR 4.71 sec III (iv).

III. State's allegation of mischaracterization of prosecutorial misconduct

The State's allegation that the defense mischaracterized evidentiary issues as prosecutorial misconduct regarding Julia Venegas is without merit. A conversation, weeks before the trial began, with Mr. Vu by Mr. Buckley as to what Ms. Venegas was going to testify to which would be relevant to the proceedings. When confronted in regards to what she was going to testify to Mr. Vu specifically shrugged his shoulders and indicated he would think about it. At that time it was clear that the State's agents, Detective Buckner and Detective Schultz, had in fact reinterview Ms. Venegas after she had been arrested for domestic violence. She was being held on an ICE hold based upon her alien status. As a result of that contact, the information which Mr. Vu attempted to elicit from Ms. Venegas at trial was that the victim knew who shot him and was going to identify Mr. Gasteazoro. Further, the detectives interviewed her and did not tape record the interview. Further, they did not provide that information in any police reports to the defense even though that was

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critical evidence which had been requested by the defense. Then by acquiring a "get out of jail free" card through immigrations, they bought and paid for her testimony in essence. The defense was not made aware of the deal with immigration or what negotiations were conducted which clearly benefited Ms. Venegas until after the trial started.

Finally, Mr. Vu's failure to inquire of victim, Mr. Muro, as to whether or not he had spoken to Ms. Venegas as to that subject matter and further failure to follow-up on it violated the ER 617 in terms of the procedures which should have been used at trial. That, in and of itself denied the victim and therefore the defense the opportunity to inquire as to what the conditions were at the time the comment was made or if it was made. The fact that Ms. Venegas had pending domestic violence charges against her and the victim was Mr. Muro clearly would have been relevant to inquiry by the defense during the trial. The violation by Mr. Vu of Rule CrR 4.71(i) was substantial in prejudicing the defendant.

The allowance of Ms. Venegas to testify that Mr. Muro knew who shot him substantiated the testimony of the detectives. While it was for the limited purpose of impeachment of Mr. Muro, it is clear that such impeachment testimony could have been misconstrued and used as substitive evidence by the jury in convicting Mr. Gasteazoro. Especially in a case where the State had no direct evidence of Mr. Gasteazoro's participation in the criminal endeavor except those statements and Mr. Jacobsen's testimony.

IV. New Evidence

Finally, the Defense requests the Court for a new trial based upon newly discovered

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evidence. Mr. Teply has acquired additional information regarding the State's primary witness against Mr. Gasteazoro, Mr. Jacobsen. It appears that in subsequent interviews by detectives of Mr. Jacobsen, as to his limited participation in the murder case he has pending, has significantly increased from having a peripheral role and being an accomplice to being one of the conspirators. Mr. Teply has been informed and has indicated to counsel that in a subsequent interview with Mr. Jacobsen, post trial, he has altered his story as to his participation in the crime he is being charged with. That participation indicates that he was much more involved in the criminal endeavor then was known before. This is contrary to the information that he gave at his initial interview with Mr. Teply with regard to his participation in the homicide. There is information that when Mr. Jacobsen went to the scene of the crime he was armed with a weapon. Further he was involved in taking property and the murder of the victim. That information would have been subject to cross examination by the defense had it been known at the time of the trial and clearly would have been impeachment evidence which could have diminished Mr. Jacobsen's creditability with the jury. While it is unknown when Mr. Jacobsen changed his story with regard to his participation in the murder he is being charged with, It is clear that that information, had it been known to the defense, would have been proper impeachment evidence to inquire into.

The very fact that Mr. Jacobsen was the primary witness against Mr. Gasteazoro and his was the only direct testimony that Mr. Gasteazoro was in fact involved in the shooting of Mr. Muro is significant.

"In order to establish prosecutorial misconduct, the defense "must show that the

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prosecutor's conduct was improper and prejudices his rights to a fair trial" State v. Dhalival, 150 Wn 2d 559 79 Pacific 3d 432 (2003). Prejudice is established where there is "a substantial likelihood that the instances of misconduct affected the jury's verdict."

"In determining whether the misconduct warrants reversal we consider its prejudicial nature and its cumulative effect. State v. Suarezb, 72 Wn App 359, 864 P 2d 426 (1994); State v. Boehning, 127 Wn App 511 (2005).

In the present case it is clear that the State might argue that one instance of misconduct is not sufficient to support a motion for a new trial, it is a cumulative effect of the numerous issues raised by the defense in this particular case which leads one to reasonably believe that overall there is a substantial likelihood that such misconduct prejudiced the defendant's right to a fair trial. See State v. Belgarde, 110 Wn 2d 504, 508, 755 P 2d 174 (1998); State v. Fisher,165 Wn 2d 727 202 P 3d 957 (2009).

DATED this 14 day of July, 2010.

Charles H. Buckley, Jr., WSB # 9048
Attorney for Defendant

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APPENDIX E

READINESS HEARING
STATE V. PEDRO GODINEZ, JR.
Cause No. 12-1-02162-7
(FEBRUARY 27, 2014)

JC: Superior Court Judge Suzan Clark
DG: Dan Gasperino, Deputy Prosecuting Attorney
CB: Charles Buckley, Defense Attorney

DG: Good afternoon Your Honor.

JC: Good afternoon.

DG: This case is set for readiness today with a Monday, March 3rd trial date in Department 6. The State is ready for trial.

CB: Defense is also ready for trial. We are calling it ready.

JC: And I believe, in talking to Judge Johnson, that is what Department 6 anticipated, so.

DG: Yes, I think they're aware of that as well.

JC: Okay, Monday morning then?

DG: Yes, we're going to go up and deal with some uh, potential logistic issues as far as how many days it's going to take and just so the judge is clear that they know what we are anticipating, but other than that we are ready.

JC: Great.

DG: Thank you very much Your Honor. Oh, I actually have a Jury Book Order, Your Honor.

JC: Uh, you can hand that up and I'll sign it.

DG: Thank you, Your Honor.

Ap
Court Admin.

FILED
2014 FEB 27 PM 2:27
SCOTT G. WEBER, CLERK
CLARK COUNTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON, Plaintiff, vs PEDRO GODINEZ, JR, Defendant	ORDER AUTHORIZING REVIEW OF JURY BOOK (INCLUDING JURY LIST) No 12-1-02162-7

Daniel A. Gasperino, Deputy Prosecuting Attorney for Clark County, State of Washington, having applied to the Court for an Order allowing him, and any Clark Deputy Prosecuting Attorney or staff member employed by the Clark County Prosecutor's office, to review the juror book and the jury list The state assures the Court that no copies will be made and no other person shall be allowed to review the material and the book shall be returned to the Court within twenty four hours, now, therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED subject to the conditions set forth above, Daniel A. Gasperino, may remove the juror book from the Court for his personal review and immediate return to the Court

DATED this 27 February, 2014

THE HONORABLE SUZAN CLARK
Judge of the Superior Court

Presented by:

DANIEL A. GASPERINO, WSBA #35626
Deputy Prosecuting Attorney

CLARK COUNTY PROSECUTING ATTORNEY
1200 FRANKLIN STREET • PO BOX 5000
VANCOUVER, WASHINGTON 98666-5000
(360) 397-2261 (OFFICE)
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Godinez 3

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR CLARK COUNTY
page 1 of 2

Judge: CLARK

STATE OF WASHINGTON
VS.
GODINEZ, PEDRO

02/27/2014 ~~13:30~~ 1:55PM

PA: ~~ST.CLAIR~~ Gasperino

DOB: 05/26/93

Atty: BUCKLEY ~ P
Reporter: CASSETTE
Clerk: (RADER) BROWN
P.O.:

Cause# 12-1-02162-7
Charge(s): MURDER I
KIDNAPPING I
ROBBERY I

Rkdt: 12/11/12 Cell: G3-8 Bail: 1000000.00 CFN: 205178

[MUST RETURN FOR CONDITIONS BEFORE RELEASE O N BAIL] | [OC:ATT MURDER I]
[MUST RETURN FOR CONDITIONS BEFORE RELEASE O N BAIL]

ASSIGNED DEPT # 1 2 3 4 5 (6) 7 8 9 10 Case Reassigned to: _____

1ST APPEAR ___ARRAIGNMENT___CHANGE OF PLEA___SENT___VIOL___REV RELEASE___OMNIBUS___ READINESS ✓ OTHR___

Defendant Appeared (Yes) No In Custody (Yes) No Warrant Authorized _____ Warrant Outstanding _____

Deft Answers to True Name as Charged ✓ Advised of Civil & Constitutional Rights ✓
Probable Cause Found _____ Probable Cause Not Found _____
Order for Psych Eval at WSH ___sgnd Attorney _____ Appointed/ Retained/ Waived
Personal Recognizance/ Supervised Release Granted / Denied . Release Revoked _____
Bail $_____With Conditions Set/ Return to Court to Be Set/ Previously set. Bail Posted By: _____
Diversion Referral/ Confirmation ____ Stay Granted ____ **PV: Admit ____ Deny ____ Set Hrg ____**
Next Court Appearance _____Time _____ For Arraign _____ Omnibus ____ Payment Rev____
PV tracking with _____ Trial in Dept # _____ Other _____

NOT GUILTY PLEA/MOTION TO CONTINUE
Information Served on Defendant _____
Not Guilty Plea Entered _____
Motion For Continuance of Trial Granted ____Denied ____
Waiver of Speedy Trial Signed _____
Readiness Hearing Date_____RS 1:30PM
Trial Date _____ [ ]

GUILTY PLEA Original/ Amended
Statement on Plea of Guilty _____ Sgnd
Psych Evaluation Ordered _____
Pre-sentence Report Ordered _____
Dismissal of Counts # _____
Sentencing Date _____

SENTENCING
Courts Finds the Defendant:
_____Guilty as Charged Based on Plea of Guilty
_____Convicted by the Jury _____Court_____
_____ in violation based on admissions
Defendant is Sentenced to Jail /DOC for_____ Days/ Months/ Years to be Served as Follows:
CTS _____JAIL_____WORK RELEASE_____WORK CREW_____COMM SERV_____SSOSA____DOSA_____
Misdemeanor Sent._____ days with _____days suspended/ deferred on conditions for _____months/ years.
Community Custody ____ Mos. HIV/ DNA ____ DNA Fee $_____ Other Costs $_____ DV Penalty $ _____
Court Costs $_____ Fine $_____Drug Fund $_____Atty Fees $_____Extrdt $_____ Lab Fee $_____
Restitution $_____ Victim Assess $_____ Deft Served With Map to DOC/COLLECTIONS____
Judgment & Sentence Signed _____ Defendant Fingerprinted Yes/No
Deft is Advised of His/ Her Rights to Appeal _____ Court Sets Appeal Bond at $_____ NCO Granted / Denied

OMNIBUS
Def Omnibus _____Sgnd State's Omnibus _____Sgnd
Cut Off date_____

Case called & Ready For Trial

CLARK COUNTY PROSECUTOR

December 20, 2016 - 4:29 PM

Transmittal Letter

Document Uploaded: 1-prp2-490447-Response.pdf

Case Name: Personal Restraint Petition of Sergey Gensitskiy
Court of Appeals Case Number: 49044-7

Is this a Personal Restraint Petition? ■ Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: ____

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

■ Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Pamela M Bradshaw - Email: pamela.bradshaw@clark.wa.gov

A copy of this document has been emailed to the following addresses:

todd@ahmlawyers.com